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Supreme Court, U.S.
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No. 99_____

IN THE
SUPREME COURT OF THE UNITED STATES

DiMa Corp.,

Petitioner,

vs.

The Town of Hallie
Wisconsin,

Respondent.

ON
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Seventh Circuit misread prior opinions of this Court when it held that non-obscene sexually explicit speech is entitled to such lesser constitutional protection so that all regulation of such speech is automatically entitled to be treated as content-neutral in nature?

2. In determining whether a regulation of sexually explicit speech is content-nuatral in nature, did the Seventh Circuit err in determining that a legislative history indicating a content-based legislative intent is irrelevant to determining the content-neutrality of such a regulation?

3. Does the viewing of a footnote in a published District Court opinion constitute "evidence" upon which even a content-neutral regulation of speech may be based ?

4. Is "objective truth" as to whether adult entertainment causes adverse secondary effects legally irrelevant to the constitutionality of a regulation of First Amendment protected conduct?

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CORPORATE DISCLOSURE STATEMENT

Petitioner in the above-entitled matter is DiMa Corp., a Minnesota corporation. There is no parent or publicly held company owning more than 10% of the corporation's stock.

All parties to the proceeding are listed in the caption.

DiMa Corp., respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit, issued July 26, 1999, Appendix at A.1-A.13, and for which rehearing was denied on August 24, 1999 (A.32-A.33).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is unpublished, reported at 185 F. 3d 823 (7th Cir. July 26, 1999), and reported in full at 1999 U.S. App. LEXIS 20301. The opinion of the United States District Court for the Western District of Wisconsin is unreported and set forth in the Appendix at A.14-A.31.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit rendered its judgment on July 26, 1999, and denied a timely petition for rehearing with a suggestion for rehearing en

banc on August 24, 1999. Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. Sec. 1254 (1).

CONSTITUTION AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment 1.

The First Amendment to the United States provides, in pertinent part: "Congress shall make no law...abridging the freedom of speech or of the press..."

Constitution of the United States, Amendment 14.

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part: "...nor shall any State deprive any person life, liberty, or property without due process of law..."

Title 42 U.S.C. Sec. 1983.

Title 42 U.S.C. Sec. 1983 provides, in pertinent part: "every person who, under color of state laws...subjects or causes to be subjected, any citizen to the deprivation of any rights, privileges or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law."

Hallie Town Ordinance No. 98-1.

Because if its voluminous nature, Hallie Town Ordinance 98-1 is set forth in the Appendix at A.47-A.53.

STATEMENT OF THE CASE

Petitioner DiMa Corp., operates an adults-only bookstore within the Town of Hallie, Wisconsin. The bookstore features the sale of sexually explicit books and magazines, as well as the display of sexually explicit videotapes in private viewing booths.

On March 2, 1998, the Town of Hallie adopted Ordinance No. 98-1. The purpose and intent of the ordinance is set forth in Sec. 1.02 of the ordinance as follows:

> "The Town Board finds that adults-oriented establishments may by their nature, design and intended use be conducive to high-risk sexual behavior and constitute a potential disturbance to the public peace and good order. High-risk sexual behavior has the potential of exposing persons to among other things, the Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS). AIDS is currently determined to be irreversible and uniformly fatal. The operation of such establishments, although protected to a certain degree as an exercise of free speech rights under the State and Federal Constitutions, is also found to present a potential for disorderly and anti-social behavior requiring, for the good of the residence of the Town, that the Town Board regulate this type of activity. This section is created to provide minimum standards for such adults-oriented establishments in order to protect the general health, safety and welfare of

> the citizenry, by regulating those features of adult-oriented establishments which tend to facilitate and promote high-risk sexual behavior and by providing regulations which aid in the surveillance and detection of unlawful activities within such premises. It shall be the further purpose of this ordinance to protect and promote the public peace and good order through regulation of the conduct of business of adult-oriented establishments." Appendix at A.47 - A.48.

In Sec. 1.03, the ordinance defines the terms "adult-oriented establishment" and "adult bookstore" as follows:

> "(1) 'Adult-oriented establishment' means, but is not limited adult bookstores, adult motion picture theaters and any other premises to which public patrons or members are invited or admitted and which are so physical arranged as to provide booths, cubicles, rooms, compartments or stalls separate from the common areas of the premises for the purposes of viewing adult-oriented video tapes, films, motion pictures, or other offered adult entertainment, whether or not such adult entertainment is held, conducted, operated or maintained for a profit, direct or indirect.
>
> (2) 'Adult bookstore' means an establishment having as its stock in trade, for sale, rent, lease, inspection or viewing books, films, video cassettes, motion pictures, magazines, or other

> periodicals which are distinguished or characterized by their emphasis depicting, describing or relating to specific sexual activities or specified anatomical areas, and in conjunction therewith have facilities for the presentation of adult entertainment, including adult-oriented video tapes, films, or motion pictures or other offered entertainment for observation by patrons therein...
>
> The same section defines the terms "specified sexual

activities" and "specified anatomical areas" as follows:

(8) 'Specified sexual activities' means simulated or actual:

> (a) Showing of human genitals in a course of sexual stimulation or arousal;
>
> (b) Acts of masturbation, sexual intercourse, sodomy, bestiality, necrophilia, sado-masochistic abuse, fellatio, or cunnilingus;
>
> (c) fondling or erotic touching of human genitals, pubic region, buttock or female breasts.

(9) 'Specified anatomical areas' means:

> (a) Less than completely and

> opaquely covered human genitals, public region, buttocks and female breast below a point immediately above the top of the areola.
> Id. at A.48 - A.50.
> (b) Human male genitals in a discernable turgid state, even if opaquely covered."

Petitioner commenced an action in United States District Court for the Western District of Wisconsin, challenging the validity of ordinance No. 98-1 under the First and Fourteenth Amendments to the United States Constitution. The action was brought under Title 42 U.S.C. Sec. 1983. Jurisdiction of the District Court was invoked under Title 28 U.S.C. Sec. 1343(3). A copy of the complaint is set forth in the Appendix at A.34 - A.53.

No attempt was made to justify the hours of operations provisions of the ordinance on the basis of adverse secondary effects until after the ordinance was challenged in court. At that point, in an affidavit in support of Appellee's motion for summary judgment, Hallie Town Board Chairman Gary Misfeldt assert that the Town Board's action in enacting ordinance No. 140, based its decision upon the following listed factors:

> "A. The impact 24-hour-a-day adult-oriented establishments would have on theTown's police

department.

B. The impact 24-hour-a-day adult-oriented establishments would have I raising the potential for criminal activity.

C. Loitering by minors of the presence of minors at or in proximity to 24-hour-a-day adult-oriented establishment.

D. The impact 24-hour-a-day adult-oriented establishments would have potentially increasing the incidence of sexually transmitted disease (STD).

E. The impact 24-hour-a-day adult-oriented establishments would have upon the quality of life and the Town of Hallie (i.e. potential harm to children in the area due to proximity with Town park and recreation area).

F. The experience of the Wisconsin cities of Eau Claire and West Allis by modeling Hallies' ordinance upon their ordinances.

G. Reliance upon the Town attorney's legal opinion which defined the limited of the Town's constitutional power and regulatory authority considering the First Amendment rights of the Plaintiff and appropriate state and federal case precedent, including cases from United States Supreme Court." Id. at A.66 - A.68.

Misfeldt's assertion is utterly without support in the documentary legislative history of the ordinance. Quite to the contrary, both Misfeldt, who offered the ordinance, and Town Board Member Shirley Sippel, plainly indicated at the Town

Board Meeting of April 6, 1998, that the decision to enact the ordinance was content-based. At that meeting, Midfedlt in addressing Appellant's President, Malcolm Prinzing, stated the following:

> "Mal, why would we consider, and I think the Board feels that we are being reasonable, why would we consider allowing a business of your type, which a good share of the general public would describe this as being there to satisfy individual's vices and needs (emphasis supplied), why would we consider to allow you any more privileges than we would allow a drinking establishment. Id. at A.103.

Later on in the same meeting Misfeldt describes Petitioner's establishment as "which again, I think a lot of people feel is a form of vice just like alcohol is, you know. Id. At A.103.

In another display of candor, Misfeldt states:

> "If you were the Town Board, put yourself in our position, what would you say to the individual that, and there's been several individuals, I've got a stack of letters that have been sent to the town, basically asking us to close, do everything within our means to close your business.? I mean we realize we're not in a position to do that, and we do not have any intentions to do that. But there is much of the general public that doesn't No. 1 approve of the business and certainly doesn't approve of that

> business being open 24 hours a day. So what would you tell our town constituents or our area constituents in the various municipalities? How would you explain that to them?" Id. at A.104.

Misfeldt's comments were reinforced by Board Member Shirley

Sippel, who states at the April 6, 1998 Board Meeting:

> "We have over 5,000 people in the Town of Hallie, and we've heard from tons of them on this and from lots of them who are not, and who would just go by and were not in the town, and I think we owe, when we did this, we thought we owed that to the constituents of the town because that's the only place where we would really control anything by the statutes and so we chose to do that." Id. at A.104 .

Other evidence plainly contradicted the Misfeldt affidavit as to the purpose of the ordinance. For example, since Petitioner's store opened for business in December of 1997, Heckel's Big steer Restaurant, one of the businesses permitted to be open 24 hours a day, has been the subject of 12 police calls, virtually all of which occurred in the early morning hours, including five reports of rowdy and disorderly patrons, and six reports of theft. Likewise, the Holiday gas station, during the same period of time had four police calls, including three reports of theft and one report of a suspected care theft.

During the same period of time, Petitioners' establishment had four police calls, two of which are of a nature which cannot be determined from the report, one for a theft, and one relating solely to the fact that a nearby power line transformer blew up and the pole was on fire, something hardly attributable to Petitioner's business establishment. Id. at A.92-A.102.

Consequently, not only is there no evidence the Petitioner's establishment is responsible for more crime and demand from police services than other establishments, the evidence plainly reflects that it generates far less crime and far fewer demands on police services than does the Heckel's Restaurant, permitted to be open 24 hours per day.

In addition, on June 2, 1998, a Hallie Police officer stopped at Petitioner's establishment and requested that an employee identify a suspect in a sexually assault which occurred at the Kwik Trip store, and to post his photograph, a requires which the clerk complied with. During the course of a subsequent conversation, the Hallie Police Officer volunteered to Petitioner's clerk that the Hallie Police Department was grateful that Petitioner's establishment was open 24 hours per day, because it was a deterrent to crime. Id. at A.108- A.109.

Even more lacking in support is the purported concern about minors loitering around Petitioner's establishment in the

early morning hours, and danger to children using a nearby town park and recreation area. As for loitering minors, Hallie Town Ordinance No. 119, sets forth at Id.at A.105- A.106, specifically prohibits minors under the age of 14 from loitering anywhere in the town between the hours of 10 p.m. and 5 a.m.., and minors under the age of 16 from loitering anywhere between the hours of 11 p.m. and 5 a.m. Moreover, if minors were to "loiter" anywhere, they would obviously loiter at a place to which they could be legally admitted, such as Heckel's Kwik Trip and Holiday, rather than at a place from which they would automatically be excluded, such as "Pure Pleasure." As for the park, the park is located over two miles away from Petitioner's establishment, and it is necessary to cross a 4-lane highway in order to get there. The park is not visible from the Pure Pleasure store, nor is the Pure Pleasure store visible from the park. Id. at A.111 - A.112. What "danger" the store thus poses to any children using the park during any hour of the day is unexplained by Respondent. Moreover, during virtually all of the hours which the store is required to close, minors are prohibited by the curfew law from going to the park, and the park is dark and unlit. Id. at A.112-A113.

Notwithstanding the foregoing record, the constitutional validity of the hours of operations provision was upheld by the

District Court,[1]

and the United States Court of Appeals for the Seventh Circuit.[2]

ARGUMENT

I. THE SEVENTH CIRCUIT'S HOLDING THAT SEXUALLY EXPLICIT SPEECH IS ENTITLED TO A LESSER DEGREE OF CONSTITUTIONAL PROTECTION THAN OTHER SPEECH AND THAT REGULATION OF SEXUALLY EXPLICIT SPEECH SHOULD AUTOMATICALLY BE TREATED AS CONTENT-NEUTRAL CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

Central to the Seventh Circuit's upholding the validity of the ordinance in question was its reliance upon the decision of the United States Court of Appeals for the Sixth Circuit in *Richland Bookmart, Inc. v. Nichols*, 137 F. 3d 435, 440 (6th Cir. 1998), circumventing the entire merits of the discussion whether the ordinance in question was content-neutral, by holding that because sexually explicit speech, by virtue of the United States Supreme Court's decision in *Young v. American Mini Theaters*, 427 U.S. 50 (1976), is "less than fully protected" speech, regulation of such speech automatically entitled to be treated as content neutral in nature. The analysis

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1See Appendix at A.14-A.31.

2See Appendix at A.1-A.13.

completely misapprehends the operative decision of this Court decisions on the subject.

To begin with, far from holding that sexually explicit speech is entitled to less constitutional protection than speech in general, a majority of this Court in *Young* expressly rejected that proposition. The four dissenting justices, in an opinion written by Justice Stewart stated:

> "By refusing to invalidate Detroit's ordinance the Court rides roughshod over cardinal principles of First Amendment law, which require that time, place, and manner regulations that affect protected expression be content-neutral except in the limited context of a captive or juvenile audience (footnote omitted). In place of these principles the Court invokes a concept wholly alien to the First Amendment. Since 'few of us would march our sons and daughters off to war to preserve the citizens right to seek 'Specified Sexual Activities' exhibited in the theaters of our choice,' [citation omitted] the Court implies that these films are not entitled to the full protection of the Constitution. This stands 'Voltaire's immortal comment,' [citation omitted], on its head. For if the guarantees of the First Amendment were reserved for expression that more than a 'few of us' would take up arms to defend, then the right of free expression would be defined and circumscribed by current popular opinion. The guarantees of the Bill of Rights were designed to protect against precisely such majoritarian

> limitations on individual liberty (footnote omitted)." 427 U.S. at 85-86, Stewart J. dissenting.

The fifth vote which gave the Court its majority in *Young* was provided in the concurring opinion of Justice Powell, who also expressly rejected the plurality's opinion that sexually speech was entitled to a lesser degree of First Amendment protection. Justice Powell, in concurring in *Young*, wrote:

> "I do not think we need reach nor am I inclined to agree with the holding in Part III (and supporting discussion) that non-obscene erotic materials may be treated differently under First Amendment principles from other forms of protected expression. I do not consider the conclusions in Part I to depend upon distinctions between protected speech." 427 U.S. at 73, n. 1, Powell J., concurring.

To be sure, in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 49, n. 2 (1986) this Court's majority opinion cited the language of the plurality opinion to the effect that sexually explicit speech was entitled to lesser constitutional protection. However, this is at best, dicta, unnecessary to the holding to the Court in *Renton*. Moreover, it should be noted that even subsequent to *Renton*, in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), this Court invalidated a Dallas, Texas,

municipal ordinance aimed directly at sexually explicit businesses, licensing such businesses, in violation of long-established First Amendment principles. The case clearly presented and opportunity for the Court to adopt the position advanced sexually explicit speech was entitled to lesser protection than First Amendment speech generally. It plainly did not do so, and only the dissenting opinion of Justice Scalia even remotely hinted at such a result. .

Moreover, in *Boos v. Barry*, 485 U.S. 312 (1988), decided two years subsequent to *Renton*, this Court expressly rejected the proposition advanced by the Seventh Circuit in this case and by the Sixth Circuit in *Richard Bookmart* that all regulation of sexually explicit speech is automatically to be deemed content neutral, because of the lesser degree of constitutional protection involved. In that case, this Court invalidated a provision of the District of Columbia code making it unlawful to display within 500 feet of a foreign embassy any sign tending to bring a foreign government into public odium or public disrepute. In invalidating the ordinance, the Court expressly rejected a "secondary effects" argument based upon *Renton*, stating:

> "We spoke in that decision of only <u>secondary</u> (emphasis by the Court) effects of speech, referring to regulations that apply to a particular

> category of speech because the regulatory targets happen to be associated with that type of speech, so long as the justification for the regulations have nothing to do with content, i.e., the desire to suppress crime has nothing to do with the actual films being shown inside adult movie theaters, we concluded that the regulation was properly analyzed as content neutral.
>
> Regulations that focus on the direct impact of speech on its audience present a different situation. Listeners' reaction to speech are not the type of 'secondary effects' we referred to in *Renton*. To take an example factually close to *Renton*, if the ordinance there was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, than analysis of the measure as a content-based statute would have been appropriate (emphasis supplied)." Id. at 320-321 .

Most recently, in *Reno v. ACLU*, 521 U.S. 844 (1997), this Court expressly held a regulation of sexually explicit speech, under the Communications Decency Act to be content-based in nature, not even remotely suggesting that some lessor degree of protection for sexually explicit speech could somehow render the regulation in question content-neutral.

Thus, far from treating regulation of sexually explicit materials as automatically content neutral, based upon a lesser

degree of constitutional protection, this Court has held that the content-neutral/content-based analysis is to be made on a case-by-case basis, depending upon the justification for the ordinance in question. For the Seventh Circuit to hold otherwise is in direct violation of operative decisions of this Court.

II. THE SEVENTH CIRCUIT ACTED IN VIOLATION OF DECISIONS OF THIS COURT WHEN IT REFUSED TO CONSIDER EVIDENCE OF A CONTENT-BASED JUSTIFICATION FOR THE ORDINANCE IN ITS LEGISLATIVE HISTORY.

Closely related to the Seventh Circuit's automatically relegating sexually explicit to second class status, and thus automatically invoking content-neutral analysis, is the Seventh Circuit's fundamental error in refusing to consider essentially uncontradicted evidence of a content-based motive in enacting the ordinance, including a legislative history indicating that the author of the ordinance stated that his purpose in introducing the ordinance was to limit the hours of an adult bookstore's operation because he considered it "vice" activity and the statement from another town board member that the board, in deference to its constituents, would have preferred to close the bookstore entirely, but that limiting the hours of operation was the most the board believed the courts would allow them to get

away with.[3]

In holding that such clear statements of a content-based motive are irrelevant to the constitutionality of the ordinance, the Seventh Circuit relied primarily upon the concurring opinion of Justice Scalia in *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993) (Scalia, J., concurring in part and concurring in judgment).[4] The Seventh Circuit plainly acknowledged, however, that Justice Kennedy, who wrote the majority opinion in *Hialeah*, expressly stated that the motives of the City Council in suppressing the religious beliefs of the church in question plainly was relevant to the First Amendment claim,[5] but added that this portion of the majority opinion "was joined only by Justice Stevens." Appendix at A.7, n. 4. There are several problems with reliance upon Justice Scalia's concurring opinion in *Hialeah*.

To begin with, while the Seventh Circuit rejected part II-A-2 of the *Hialeah* opinion as being joined in only by Justice Stevens, it should be noted that Justice Scalia's concurring opinion, specifically rejecting the motives of the City Council as

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3See Appendix at A.103 - A.104.

4Appendix at A.7.

5See Id. at 540-542.

relevant, was joined in only by Chief Justice Rehnquist, meaning it commanded no more support on the United States Supreme Court than did the contrary position of Justice Kennedy. Furthermore, it is clear that part II-A-1 of the majority opinion in *Hialeah*, which clearly commanded a majority of the Court,[6] specifically stated that the intent of the enactment was plainly relevant to the First Amendment claim, the court stating:

> "Official action that targets religious conduct for distinctive treatment cannot be shielded by mere compliance with the requirement of facial neutrality. The Free Exercise Clause protects against governmental hostility which is masked, as well as overt. 'The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders.' [Citation omitted.]" 508 U.S. at 534.

Secondly, and perhaps more importantly, Justice Scalia in the *Hialeah* case relied for his assertion that governmental motive was irrelevant upon his dissenting opinion in *Edwards v. Aguillard*, 482 U.S. 578 (1987).[7] In *Edwards*, Justice Scalia's position that the motives of the legislators in enacting a statute

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6This part of the opinion was specifically joined in by Chief Justice Rehnquist, Justice White, Stevens, Scalia, and Thomas.

See 508 U.S. at 558 (Scalia, J. concurring).

requiring the state's public schools to give "balanced treatment" to "creation science" and "evolution science" was constitutionally irrelevant was plainly rejected by a majority of this Court. In that case, the Court's majority opinion, written by Justice Brennan specifically noted:

> "While the court is normally deferential to a State's articulation of a secular purpose, it is required that the statement of such purpose be sincere and not a sham. [Citations omitted.]" Id. at 586-587.

On further examining the legislative history and other factors, the

Court in *Edwards* stated:

> "As in *Stone* [*v. Graham*, 449 U.S. 39 (1980)] and *Abington* [*School District v. Schempp*, 374 U.S. 203 (1963)], we need not be blind in this case to the Legislature's preeminent religious purpose in enacting this statute. There is a historic and contemporaneous link between the teachings of certain religious denominations and the teaching of evolution (footnote omitted). It was this link that concerned the Court in *Epperson v. Arkansas*, 393 U.S. 97 (1968), which also involved a facial challenge to a statute regulating the teaching of evolution. In that case, the Court reviewed an Arkansas statute that made it unlawful for an instructor to teach evolution or to use a text book that referred to this scientific theory. Although the

> Arkansas anti-evolution law did not explicitly state its predominate religious purpose, the Court could not ignore that '[t]he statute was a product of the upsurge of ''fundamentalist religious fervor''that has long viewed this particular scientific theory as contradicting the literal interpretation of the bible [Citation omitted.] After reviewing the history of anti-evolution statutes, the Court determined that 'there can be no doubt that the motivation for the [Arkansas] law was the same [as other anti-evolution statutes]: to suppress the teaching of a theory which, it was thought, "denied" the divine creation of man.' [Citation omitted.]" 482 U.S. at 590.

City of Renton v. Playtime Theaters, Inc., supra, 475 U.S. 41, (1986), is not to the contrary. Although the *Renton* court did cite with approval the quotation from *United States v. O'Brien,* 391 U.S. 367, 383 (1968), to the effect that the court would not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive,[8] it did so in the context of rejecting the analysis adopted by the Ninth Circuit in *Tovar v. Billmeyer,* 721 F. 2d 1260, 1266 (9th Cir. 1983), by which the court said it would invalidate an ordinance if "a motivating factor" in the enactment of the ordinance was to restrict the exercise of First Amendments rights. However,

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8See 475 U.S. at 48.

while relying upon the quotation from *O'Brien*, the Court in *Renton*, in fact, engaged in precisely the same analysis of motivation as did the Court in *Edwards*. It held that the District Court's finding that combating secondary effects was the "predominate" intent was "more than adequate to establish that the city's pursuit of its zoning interest here was unrelated to the suppression of free expression,"[9] using precisely the same language used by the majority in *Edwards*.[10] In other words, the law, as described in *Renton* and *Edwards* is not that the motivations of the enacting legislators are totally irrelevant; but rather only that the fact that a motivating factor may have been censorial in nature is not determinative. The Court, in analyzing an enactment under the First Amendment must in fact examine the legislative history and determine the predominate intent of the enactment. If the predominate intent of the enactment is censorial in nature, that predominate intent is sufficient to invalidate the enactment.[11]

9Id. at 48.

10See 482 U.S. at 590, when this Court's majority referred to a "predomin religious purpose."

11This analysis is also more than confirmed by the language of the majority opinion in *Boos v. Barry*, supra, 485 U.S. 312, 320, 321, (1988), to the effect that the regulations adopted in *Renton* would not

III. THE SEVENTH CIRCUIT VIOLATED APPLICABLE DECISIONS OF THIS COURT WHEN IT HELD THAT RELIANCE UPON A FOOTNOTE IN A PUBLISHED DISTRICT COURT OPINION COULD CONSTITUTE EVIDENCE SUFFICIENT TO SUSTAIN EVEN A CONTENT NEUTRAL REGULATION.

To be sure, in *Renton*, this Court stated that in enacting time, place, and manner regulations of protected speech, cities are "entitled to rely upon the experiences of ...other cities so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses (emphasis supplied)" 475 U.S. at 51-52.

However, what is most important is the requirement that cities rely on "evidence." It is undisputed that the totality of the "evidence" in the instant case consisted of reliance upon a footnote in a district court opinion in *Tee & Bee v. City of West Allis*, 936 F. Supp. 1479 (E.D. Wis. 1996). This is plainly insufficient, as a matter of law, to sustain an ordinance against a First Amendment challenge, especially in light of recent

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have passed constitutional muster had their justification been content-based, such as a desire to protect viewers from the harmful effects of viewing sexually explicit materials. For an excellent analysis of censorial motive in First Amendment cases, see Kagan, " Private Speech and Public Purpose: The Role of Governmental Motive in First Amendment Doctrine, 63 U. of Chi. L Rev. 413, 431- 432, 489- 490 (1996).

decisions of this Court. For example, in *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622 (1994), this Court has held that even in applying a content-neutral *O'Brien* test:

> "[W]e have stressed the First Amendment cases that deference afforded to legislative findings does 'not foreclose our independent judgment of the facts bearing on an issue of constitutional law.' [Citation omitted.] This obligation to exercise independent judgment when First Amendment rights are implicated is not a license to review the evidence de novo, or to replace Congress' factual predictions with our own. Rather, it is to assure that, in formulating judgments, Congress has drawn reasonable inferences based on substantial evidence. [Citation omitted, emphasis supplied.]" Id. at 666.[12]

Just as significant as the "substantial" evidence requirement in the *Turner* cases is the fact that this Court is now much more carefully scrutinizing the extent of evidentiary justification for First Amendment regulation than it was at the time of *Renton*. In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996), this Court considered the application of the

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12This standard was reaffirmed when the *Turner Broadcasting* case returned to this Court after remand, this Court stating, "in the realm of First Amendment questions...Congress must base its conclusions upon substantial evidence. *Turner Broadcasting System, Inc. v. F.C.C.,520* U.S. 180, 211 (1997).

long-standing test for judging the validity of a government regulation of commercial speech, a test virtually identical to the test adopted for judging the sufficiency of a time, place, and manner regulation of non-commercial speech, such as adult entertainment, under *Renton.*[13] As was the case in *Renton* and its progeny, this Court had long held that courts were to defer to legislative judgment as to the substantiality of the governmental interest and whether the regulation was narrowly tailored to serve those interests. See, for example, *Posadas de*

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[13]In *Central Hudson Gas & Electric Corp. v. Public Service, Com.*, 447 U.S. 557 (1980), the Court advanced the following test for judging the validity of commercial speech which is not misleading or deceptive: First, that the governmental interest in the regulation be substantial, that the regulation in question directly advance the interest, and that the regulation in question be narrowly tailored, so that it is not more extensive than necessary to serve that interest. In *Renton*, and more particularly in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), this Court adopted the following tests for determining the validity of a content-neutral time, place, and manner regulation: the regulation must serve a substantial governmental interest, unrelated to the suppression of free expression, it must be narrowly tailored to serve that interest, and must leave available alternative avenues of communication. Given the extreme similarity of the tests for commercial speech and time, place, and manner regulation, there appears to be no principled reason for treating the two tests differently.

Puerto Rico Associates v. Tours and Co. of P.R., 478 U.S. 328 (1986). However, in *44 Liquormart*, the United States Supreme Court expressly overruled *Posadas*, to the extent that it required courts to defer to legislative determination as to the substantiality of a governmental interest and on the issue of narrow tailoring. The plurality opinion, written by Justice Stevens, stated the following:

> "The reasoning in Posadas does support the State's argument, but, on reflection, we are now persuaded that Posadas erroneously performed the First Amendment analysis. The casino advertising ban was designed to keep truthful, non-misleading speech from members of the public for fear they would be more likely to gamble if they received it. As a result, the advertising ban served to shield the State's anti-gambling policy from public scrutiny that more direct, non-speech regulation would draw. [Citation omitted.]
>
> Given our long standing hostility to commercial speech regulation of this type, Posadas clearly erred in concluding that it was 'up to the legislature' to choose suppression over a less speech-restrictive policy. The Posadas majority's conclusion on that point cannot be reconciled with the unbroken line of prior cases striking down similarly broad regulations on truthful, non-misleading advertising when non-speech related alternatives were available. [Citations omitted.]

> Because the 5-to-4 decision in Posadas marked such a sharp break from our prior precedent, and because it concerned a constitutional question about which this Court is to be the final arbiter, we decline to give[14] force to its highly deferential approach. Id. at 1511.

In her concurring opinion, joined in by three other justices, Justice O'Connor likewise rejected, for commercial speech cases, the *Posadas* conclusion that courts were required to defer to legislative judgment on the issue of the substantiality of the governmental interest, whether the regulation advanced that interest, and whether the regulation was narrowly tailored to serve that interest. See Id. at 1522, O'Connor, J. concurring.

Consequently, since *44 Liquormart,* this Court, whether under the Stevens plurality opinion, or the O'Connor concurrence, has now said it will "carefully examine" the

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14In this regard, it should be noted that *Posadas,* expressly overruled in *44 Liquormart,* was decided the same year as *City of Renton v. Playtime Theaters, Inc.* supra, 475 U.S. 41 (1986), in which this Court adopted a stance of deferring to legislative judgment on the identical question, in terms of time, place, and manner regulation of speech. Given the fact that the test for commercial speech and for time, place, and manner regulation are virtually identical, the overruling of the deferential standard adopted in *Posadas* should plainly indicate the same result for the deferential standard adopted in *Renton.*

substantiality of a governmental interest, the evidence relied upon by the government to establish that the regulation substantially advances that interest, and the assertion that the regulation is narrowly tailored to serve that interest.

Plainly, where the ordinance in this case subjected to the careful scrutiny now mandated by *44 Liquormart*, instead of the deferential scrutiny adopted by the Seventh Circuit, a different holding would have resulted.[15]

IV. THE SEVENTH CIRCUIT ACTED IN VIOLATION OF APPLICABLE DECISIONS OF THIS COURT WHEN IT HELD THAT "OBJECTIVE TRUTH" IN THE FORM OF UNCONTRADICTED AFFIRMATIVE EVIDENCE OF THE ABSENCE OF ADVERSE SECONDARY EFFECTS COULD NOT BE CONSIDERED WHEN JUDGING THE VALIDITY OF THE ORDINANCE IN QUESTION.

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15 The Seventh Circuit at pp11-12 of its opinion, the Appendix at A.12, in acknowledging the "fairly meager record" in support of the ordinance, held that the record to be sufficient because the record did not show the impact of the litigation on Petitioner's business, such as the amount of revenues that would be lost by the decreased hours of operation. The Seventh Circuit cited no authority to support the proposition that the substantial evidence requirement adopted by this Court in the *Turner* cases somehow varies with the amount of revenue a Plaintiff loses. Quite to the contrary, this Court has clearly held that the loss of First Amendment rights, even for a minimal time constitutes irreparable injury as a matter of law. See *Elrod v. Burns*, 427 U.S. 347 (1974).

In rejecting Petitioner's uncontradicted evidence below that Petitioner's establishment caused no more demand for law enforcement services than did any other business open 24 hours a day, and in many instances generated far fewer. The Seventh Circuit stated that such evidence was irrelevant to the question of whether there is some evidence that does support the Board's position," stating that the court could not consider "objective truth" about adverse secondary effects. Appendix at A.12.

This conclusion ignores long-standing United States Supreme Court Doctrine, originally set forth in *United States v. Carolene Products Co.*, 304 U.S. 144 (1938), in which this Court stated:

> "Where the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice...the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." 304 U.S. at 153,.

This principle was plainly applied in a First Amendment context in *New Jersey Citizen Action v. Edison Township*, 797 F. 2d 1250 (3d Cir. 1986), in which the Third Circuit overruled,

on First Amendment grounds, an ordinance which it had upheld only two years earlier in *Pennsylvania Alliance for Jobs & Energy v. Council of the Borough of Munhall,* 743 F. 2d 182 (3d Cir. 1984), upon a demonstration that the factual basis for the ordinance no longer existed.

CONCLUSION

For all of the foregoing reasons, the Petition for Writ of Certiorari

to the Seventh Circuit should be, in all respects, granted.

Respectfully submitted,

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A.1

In the
UNITED STATES COURT OF APPEALS
for the Seventh Circuit

No. 98-3997

DiMa Corporation,

Plaintiff-Appellant,

v.

Town of Hallie,

Defendant-Appellee.

Appealed from the United States District Court
for the Western District of Wisconsin.
No. 98 C 240 C-Barbara B. Crabb, Judge.

ARGUED APRIL 15, 1999 - DECIDED JULY 26, 1999

Before CUDAHY, COFFEY, and MANION, Circuit Judges.

MANION, Circuit Judge. In the Town of Hallie, Wisconsin, DiMa Corporation operates an adult bookstore, which is currently open 24 hours per day. After Hallie adopted an ordinance limiting the hours such bookstores may be open, DiMa filed this suit under 42 U.S.C. Sec. 1983 seeking declaratory and injunctive relief against enforcing the ordinance,

claiming that the ordinance violates DiMa's free speech rights under the First and Fourteenth Amendments. The district court granted summary judgment for Hallie. Because we conclude that the record sufficiently supports Hallie's claim that the ordinance is a reasonable attempt to control undesirable "secondary effects" rather than an attempt to regulate speech because of its objectionable content, we affirm the district court.

BACKGROUND

Hallie is a small town in rural Wisconsin between Eau Claire and Chippewa Falls. DiMa operates the "Pure Pleasure" bookstore in Hallie. Pure Pleasure sells sexually explicit, non-obscene books and magazines, and it has private booths in which a patron can watch sexually explicit non-obscene video tapes.[1] Since it opened, Pure Pleasure has operated 24 hours per day. In March 1998, Hallie adopted Ordinance No. 98-1, which regulates "adult-oriented establishments," including "adult bookstores." DiMa does not dispute that Pure Pleasure falls within the ordinance's definition of these terms. The ordinance regulates adult-oriented establishments in various ways but in this suit DiMa challenges only one of them: the

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1There has been no judicial finding, nor even the allegation, that these materials are obscene. Hallie decided to regulate these materials as not obscene and the parties have so treated them in this litigation. We therefore do the same.

hours of operation limits contained in Section 1.06. Under that section, an adult-oriented establishment may not be open between 2:00 a.m., and 8:00 a.m. on Monday through Friday, between 3:00 a.m. and 8:00 a.m. on Saturday, and between 3:00 a.m. and noon on Sunday. The ordinance thus requires adult bookstores to be closed about one-quarter of the hours during a week. (These are the same hours of operation limits that Wisconsin has placed on establishments that serve alcohol. See Wisc. Stat. Secs. 125.32(3) and 125.68(4). Section 1.06 has not yet been enforced: the parties stipulated to an injunction of it while the matter was pending in the district court, and the district court continued that injunction pending the outcome of this appeal.

ANALYSIS

The First Amendment provides in part that "Congress shall make no law...abridging the freedom of speech, or of the press." Section One of the Fourteenth Amendment incorporated this provision and so it prohibits state government from abridging these freedoms as well. See e.g., *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S. Ct. 1495, 1501 N.1 (1996).[2]

2Although DiMa is a corporation rather than a natural person, it may assert a First Amendment challenge. *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978).

Because the ordinance has not yet been applied to Pure Pleasure, we are confronted with a facial challenge to the statute, rather than a challenge to the way the statute has been applied to Pure Pleasure. The threshold question in a First Amendment free speech case is whether the challenged law is content-based, that is, whether the law regulates speech based on the ideas or messages it expresses. "Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992). On the other hand, government is given much more leeway when its content-neutral regulations happen to limit some speech. See *United States v. Wilson*, 154 F. 3d 658, 663 (7th Cir. 1998))"If a statute is content-based, it must survive strict scrutiny to be constitutional. It a statute is content-neutral, it is subject only to intermediate scrutiny."). Therefore, government may impose reasonable time, place and manner restrictions if the are "justified without reference to the content of the regulated

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("The proper question therefore is not whether corporations 'have' First Amendment rights and, if so, whether they are coextensive with those of natural persons. Instead, the question must be whether [the legislation in question] abridges expression that the First Amendment was meant to protect."); see also *Covington & L. Turnpike Road Co v. Sandford*, 164 U.S. 578, 592 (1896) ("It is now settled that corporations are persons, within the meaning of [the Fourteenth Amendment's protections].").

speech." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (internal quotation marks omitted).

There are some categorical exceptions to this general analysis, however; government has more freedom to regulate certain kinds of speech, even though it does so based on the content of the speech. Within constitutional limits, government may proscribe obscenity, see *Miller v. California*, 413 U.S. 15, 23 (1973); child pornography, see *Osborne v. Ohio*, 495 U.S. 103, 111 (1990); defamation, see *New York Times Co. V. Sullivan*, 376 U.S. 254, 268 (1964); and so-called "fighting words," see *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).[3] The Supreme Court applies yet a different kind of analysis to the category of speech at issue here: sexually explicit, non-obscene materials. Because this speech is not obscene, government may not simply proscribe it. See *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 66 (1981) ("[A]n entertainment program [may not] be prohibited solely because

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3But even within these traditional categorical exceptions, the First Amendment does not permit government to discriminate only against speech that contains some other message of which the government disapproves. *R.A.V.*, 505 U.S. at 385 ("The proposition that a particular instance of speech can be proscribable on the basis of one feature (e.g., obscenity) but not on the basis of another (e.g., opposition to the city government) is commonplace and has found application in many contexts.").

it displays the nude human figure."). But because these materials border on the obscene, they are entitled to less First Amendment protection than non-sexually explicit materials. See *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70-71 (1976) (plurality) ("Even though the First Amendment protects communications in this area from total suppression, we hold that the State may legitimately use the content of these materials as the basis for placing them in a different classification from other motion pictures."). So in *City of Renton v. Playtime Theatres, Inc.* 475 U.S. 41, 49 (1986), the Court held that "at least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations." (Footnote omitted).

As the Sixth Circuit recently noted, the Court's analysis has caused some confusion among courts and litigants, and that confusion is evident in this case. See *Richland Bookmart, Inc. v. Nichols*, 137 F. 3d 435, 440 (6th Cir. 1998). The Court held that regulation of sexually explicit material would be treated like content-neutral time, place and manner regulations, not that it was content-neutral. Thus when courts and litigants fall into the shotrhand of simply referring to regulations like the one here as "content-neutral," they can find themselves arguing about

irrelevancies. Here, DiMa, with ample citation to cases, argues that the ordinance is not content-neutral, while Hallie argues that it is. DiMa is obviously correct: the ordinance singles out adult-oriented establishments for different treatment based on he content of the materials they sell or display. *Richland Bookmart Inc.*, 137 F. 3d at 438-39. But because that content is sexually explicit materials, DiMa's conclusion that strict scrutiny applies here does not follow. Rather, Hallie's ordinance is constitutional so long as it satisfies the requirements of a reasonable time, place, and manner restriction.

Time, place and manner restrictions are "reasonable," that is, do not violate the First Amendment, if they: (1) are justified without reference to the content of the regulated speech; (2) are narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication of the information. *Ward*, 491 U.S. at 791; see also *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (stating test with slightly different language). Hallie asserts that the third prong is satisfied because the ordinance permits Pure Pleasure to be open for significant periods of time, about three-quarters of the hours during a week, and DiMa does not challenge this assertion. DiMa also does not contend that the second prong is not satisfied: it neither challenges

Hallie's proffered interest as being not significant nor does it claim that it should be required to close for some fewer number of hours. Our analysis, the, focuses only on he first prong. DiMa levels a number of attacks at the ordinance, arguing that it is not justified as anything other than a regulation of sexually explicit material of which the Hallie city officials disapprove.

We can reject DiMa's first argument rather easily. DiMa claims that at least some of the Hallie Township Board members had an improper motive when they voted for the ordinance; rather than acting to combat crime, deter sexually transmitted diseases, and the other "legitimate" goals that the ordinance's preamble asserts, at least some of the Board members voted for the ordinance because of local opposition to the "vice" of sexually explicit materials. The record shows that DiMa is correct. Some members of the Board desired to close down Pure Pleasure altogether because of numerous complaints from Hallie residents who objected to having an adult bookstore in their town. Recognizing that the constitution did not permit proscribe sexually explicit materials, at least some of the Board members seemed willing to enact the ordinance because it was the most that they could do consistent with the Constitution. But attacking the ordinance because it was enacted by persons with "impure hearts" gets DiMa nowhere. The actual motives of those who enacted the ordinance are irrelevant to our First

Amendment analysis. "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *O'Brien*, 391 U.S. at 383; *Renton*, 475 U.S. at 47-48 (quoting *O'Brien*). Similarly, in a case applying the First Amendment's free-exercise clause, Justice Scalia, joined by the Chief Justice, rejected the idea that the motives of those who enacted the law were relevant to whether it was constitutional:

> [The language of the First Amendment] does not put us into the business of invalidating laws by reason of the evil motives of their authors. Had the Hialeah City Council set out resolutely to suppress the practices of Santeria, but ineptly adopted ordinances that failed to do so, I do not see how those laws could be said to "prohibi[t] the free exercise" of religion. Nor, in my view, does it matter that a legislature consists entirely of the pure-hearted, if the law it enacts in fact singles out a religious practice for special burdens.

Church of the Lukumi Babalu Aye, Inc. V. City of Hialeah, 508 U.S. 520, 558-59 (1993) (Scalia J. concurring in part and concurring in the judgment).[4] It would indeed be an

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4Justice Kennedy, who wrote the opinion for the majority, believed that the motives of the city council wee relevant, and applied an analysis adopted from cases applying the Fourteenth Amendment's equal protection clause. *Hialeah*, 508 U.S. at 540-42. But this part of his opinion was joined

exercise in futility of we struck down the ordinance because of the improper motives of some Board members, and the Board was then able to immediately reenact the same ordinance but with the members all being careful to avoid stating their illegitimate motives. See *O'Brien*, 391 at 384 (declining to void otherwise constitutional statute "which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it."). Thus, in analyzing whether Hallie's ordinance violates the First Amendment, we do not ask whether the motives of the Board can be justified as content-neutral time, place and manner restrictions, but rather whether the ordinance itself can be so justified. See *Renton*, 475 U.S. at 48.

The justification advanced by Hallie is combating potential undesirable "secondary effects" of adult oriented establishments. This is a significant government interest. *Renton*, 475 U.S. at 50. Those undesirable secondary effects could include the spread of crime and sexually transmitted diseases, a decline in property value, or an increase in public sexual acts. Although the ordinance's preamble cites numerous secondary effects that it was meant to combat, on appeal, as it did in the court below, Hallie focuses on the Board's conclusion that one of the secondary effects of the adult-oriented

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only by Justice Stevens.

businesses was increased crime and the ordinance was reasonably necessary to combat it. In response to a First Amendment challenge, the municipality bears the burden of showing that there is evidence that supports its proffered justification. See *J & B Entertainment, Inc. V. City of Jackson,* 152 F. 3d 362, 370-71 (5th Cir. 1998) (city bears burden both of production and persuasion). This burden is not overwhelming. "The First Amendment does not require a city before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Renton,* 475 U.S. at 51-52. The district court correctly concluded that Hallie's ordinance does not itself contain any evidence to support its proffered justification; its conclusory assertions regarding its goals and its effect are insufficient by themselves to survive a First Amendment challenge because they are not "evidence" as the Court required in *Renton*. The Third Circuit succinctly stated the appropriate burden in this kind of case: "[O]our First Amendment jurisprudence requires that the [municipality] identify the justifying secondary effects with some particularity, that [it] offer some record support for the existence of those effects and for the Ordinance's amelioration thereof, and that the plaintiffs

be afforded some opportunity to offer evidence in support of the allegations of their complaint." *Phillips v. Borough of Keyport*, 107 F. 3d 164, 175 (3d Cir. 1997) (en banc).

1. We also agree with the district court that a municipality may make a record for summary judgment or at trial with evidence that ir may not have had when it enacted its ordinance. D.Ct.Op. At 11-12. The Court in *Renton* did not address this issue because in that case, the city council had created an extensive record prior to enacting its ordinance. 475 U.S. at 44. The Court's most relevant guidance on this issue comes from *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). In that case, the Court addressed a First Amendment challenge to enforcing a statute banning public nudity by prohibiting totally nude dancing in establishments providing "adult entertainment." The Chief Justice, writing the plurality opinion but joined only by two other Justices, held that such nude dancing was "expressive conduct within the outer perimeters of the First Amendment though we view it only as marginally so." *Id.* at 566. The plurality opinion affirmed the stat's enforcement of its public nudity statute as a reasonable time, place and manner restriction, without analyzing whether the enforcement combated

undesirable secondary effects of the nude dancing; the plurality considered moral disapproval of nudity to be a sufficient justification. Justice Scalia concurred in the judgment, but concluded that because the law at issue was a general one regulating conduct not specifically directed at expression, it should not be subject to any level of First Amendment scrutiny. *Id.* at 572. Justice Souter concurred in the judgment and provided the fifth vote needed to overcome the views of the fourt dissenting Justices. Justice Souter, like the plurality affirmed the statute as a reasonable time, place and manner restriction, but unlike the plurality did so based on the proffered justification of combating the undesirable secondary effects of adult entertainment establishments. *Id.* at 582-83. Justice Souter's reasoning, then, appears to be the Court's holding because his was the narrowest reasoning supporting the judgment.[5] Justice Souter accepted the state's

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5When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977) (internal quotation marks omitted). Three other circuits have also concluded that Justice Souter's concurrence is the Court's holding. See *J&B*

justification and its evidence, which it proffered during the litigation, although there was no evidence that the state had been motivated by combating secondary effects when it enacted the statute or that it had had any of the evidence before it. *Id.* Moreover, Justice Souter accepted the experiences of other cities as reported in judicial opinions as being evidence upon which the legislature could have reasonably relied. *Id.* at 583-86. The *Renton* Court had similarly accepted the city's reliance on the experience of Seattle, as expressed in the detailed findings of fact summarized by the Washington Supreme Court in a prior case. 475 U.S. at 51-52 (citing *Northlend Cinema, Inc. v. Seattle*, 585 P. 2d 1153, 1159 (Wash. 1978)).

Under these standards, we conclude the Hallie has met its burden of making a record to justify its ordinance's limitation on hours of operation, but we agree with the district court that it has only minimally done so. See D.Ct.Op. at 10. Hallie relies primarily on the experience of West Allis, Wisconsin, and Hallie's ordinance was essentially copied from the one enacted

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Entertainment, 152 F. 3d at 370; *Tripplett Grille, Inc. V. City of Akron*, 40 F. 3d 129, 134 (6th Cir. 1994); *International Eateries of America, Inc. V. Broward County*, 941 F. 2d 1157, 1161 (11th Cir. 1991).

by West Allis. (West Allis is next to Milwaukee and is thus geographically far removed from Hallie.) Hallie relies on the he factual record supporting West Allis's experience as reported in *Tee & Bee, Inc. V. City of West Allis*, 936 F. Supp. 1479 (E.D. Wis. 1996), in which the district court upheld West Allis's ordinance against a First Amendment challenge. Before enacting its ordinance, West Allis had done considerable analysis of studies from other cities, which its ordinance specifically cited. 936 F. Supp. at 1483 & 1485 N3. We agree with DiMa that it is unusual for Hallie in this court to rely principally on a district court opinion. In *Barnes*, Justice Souter relied on findings reported in Supreme Court decisions and appellate decisions from the circuit in which the municipality was located. 501 U.S. at 584. Although *Tee & Bee's* discussion of the evidence relied on by West Allis is some record support justifying Hallie's similar ordinance, it is not compelling evidence.[6] Likewise, although the Hallie corporate counsel examined the First Amendment issue, the record does not reflect that he conducted any extensive analysis of the

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6We do not want our reasoning to be construed as a slight of the district court's opinion in *Tee & Bee*. The Court's opinion was thorough and well reasoned. In referring to *Tee & Bee* as not compelling evidence supporting Hallie's ordinance, we mean that as a district court opinion, to this court *Tee & Bee* is persuasive but not binding precedent.

experiences of other municipalities, as was done in other cases. Cf. *Renton*, 475 U.S. at 44 (describing extensive studies and hearings conducted by Planning Committee); *Tee & Bee*, 936 F. Sup. at 1483 (committee studied issue for 12 months). Thus, we have a fairly meager record to support Hallie's' justification of combating crime. But it is enough of a record *in* this case because DiMa's First Amendment challenge is limited to the ordinance's hours of operation regulation, and we have no reason to believe that this is a significant impairment of Pure Pleasure's business. DiMa has not created a credo to show what sort of impact this limitation would have on its business. That is, we don't know how much revenue Pure Pleasure takes in during the hours that are subject to the regulations or whether, when the hours of operation regulation is enforced, these revenues will be lost rather than merely shifted to other hours when Pure Pleasure profits would be affected, considering that presumably limiting the hours of operation would reduce its operating expenses. So we caution other municipalities not to read our decision today too broadly. We would expect a municipality defending a more substantial set of regulations to create a more substantial record in support of summary judgment *Cf. Tee & Bee*, 936 F. Supp. at 1486 ("The record is replete with information showing that the City determined it necessary to provide for the licensing and regulation of adult-

oriented businesses in order to combat the secondary effect of such facilities in the surrounding community.").

We must address one more aspect of DiMa's argument before closing. In the Court below, DiMa submitted expert testimony and a study done in Phoenix to show there is no relation between an adult-oriented business hours of operation and crime. It also proffered various evidence showing that there was in fact no correlation between Pure Pleasure being open 24 hours a day and crime in Hallie. The district court properly rejected this evidence because it merely contradicts other evidence that the Hallie Board could have reasonably relief upon. It is therefore irrelevant to the question of whether there is some evidence that does support the Board's conclusions. DiMa's contradictory evidence would be highly probative if our take were to discover the objective truth about the effect of Pure Pleasure's operating in Hallie. But our take under the first Amendment is far different. The Hallie Board has the job of sorting through the available evidence and making a political judgment about what regulations best serve Hallie's interest. We are not here to judge how well the Board did its job; our task is to determine whether the law it enacted violates the Constitution. It does not.

The judgment of the district court is AFFIRMED.

A true copy:

Teste:

Clerk of United States Court
Of Appeals for the Seventh
Circuit

A.18

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

DIMA CORPORATION,

Plaintiff,

v. OPINION AND ORDER

THE TOWN OF HALLIE,

Defendant.

This is a civil action arising under the First and Fourteenth Amendments. Subject matter jurisdiction is present. Plaintiff DiMa Corporation alleges that Ordinance 1.06, enacted by defendant Town of Hallie, violates Plaintiff's First Amendment rights by restricting the hours of its dissemination of sexually explicit expression. Presently before the court are defendants motion for summary judgment, motion to strike portions of Plaintiff's proffered affidavit testimony, motion to strike Plaintiff's proffered expert testimony and motion for attorney fees and costs. Because I find that Ordinance 1.06 is content-neutral and narrowly

tailored to serve defendant's legitimate interest and leaves open ample alternative means of communication, I will grant defendanes motion for summary judgment. I will deny defendant's motions to strike because they are rendered moot by the order

granting summary judgment. I will deny defendant's motion for attorney fees and costs.

Initially, a few comments are warranted concerning Plaintiff's summary judgment submissions. Plaintiff asks the court to incorporate into its response brief the arguments and "factual assertions" from its affidavits and memorandum submitted in support of its earlier motion for an earlier motion for a preliminary injunction and restraining order. All "factual assertions" made in a summary judgment brief must cite to a proposed finding of fact which itself rests on a citation to evidence in the record. See Procedures to be Followed on a Motion for Summary Judgment ("All facts necessary to sustain a party's position on a motion for summary judgment must be explicitly proposed as findings of fact.") The factual assertions in Plaintiff's earlier memorandum do not rest on such citations. They will be disregarded. Similarly, Plaintiff's response brief includes several facts not the subject of proposed findings of fact. These too will be disregarded. Moreover, most of Plaintiff's

proposed findings of "fact" do not cite to the record. Most are not facts at all, but are legal arguments. These too will be disregarded.

Defendant moves to strike affidavit testimony submitted by plaintiff. First, defendant Moves to strike affidavit testimony from lay witnesses whose names were not disclosed to defendants by July, 1, 1998, as required by the courVs pretrial order. Second, defendant moves to. strike affidavit testimony from an alleged expert witness whose name was not disclosed to defendants by August 2 1, 1998, as required by the coures pretrial order, Third,Defendant moves to strike affidavit testimony from Plaintiff's attorney that contains a partial transcript of defendant's board meeting of April 6, 1998, because it is not certified in compliance with Fed. R. Evid. 902. Defendant asserts several reasons why this testimony should not be stricken. I find that even if the subject testimony is admitted, defendant is still entitled to summary judgment.

I find there is no genuine dispute about the following material facts:

FACTS

Plaintiff is a corporation organized under the laws of the state of Minnesota. Defendant is a municipality organized

under the laws of the state of Wisconsin.

Plaintiff operates an adult-oriented business known as Pure Pleasure within the town's limits. Pure Pleasure offers for sale non-obscene sexually explicit books and magazines and 7, affords the opportunity for watching non-obscene sexually explicit videos in private viewing booths.

Shortly after learning that plaintiff intended to operate Pure Pleasure within town limits, the chairman of defendant's town board contacted the town's attorney for advice about defendant's regulatory authority over plaintiff. The lawyer informed the board about the experiences of the towns of Eau Claire and West Allis, Wisconsin in attempting to regulate adult-oriented businesses. The board instructed the lawyer to draft an ordinance.

Public hearings were held on the draft ordinance.

On March 2, 1998, defendant enacted Ordinance # 140 to regulate "adult-oriented establishments." Pure Pleasure is an adult-oriented establishment within the meaning of the ordinance. Among other regulations, Section 1.02 of the ordinance states:

The Town Board finds that adult-oriented establishments may by their nature, design and intended use be conducive to high-risk sexual behavior and constitute a potential disturbance to the public peace and good order.

High-risk sexual behavior has the potential of exposing persons to among other things, the Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS). AIDS is currently determined to be irreversible and uniformly fatal. The operation of such establishments, although protected to a certain degree as an exercise of free speech rights under the State and Federal Constitutions, is also found to present a potential for disorderly and anti-social behavior requiring, for the good of the residence of the Town, that the Town Board regulate this type of activity. This section is created to provide minimum standards for such adult-oriented establishments in order to protect the general health, safety and welfare of the citizenry, by regulating those features of adult-oriented establishments which tend to facilitate and promote high-risk sexual behavior and by providing regulations which aid in the surveillance and detection of unlawful activities within such premises. It shall be the further purpose of this ordinance to protect and promote the public peace and good order through regulation of the conduct of business of adult-oriented establishments.

Section 1.06 of the ordinance provides:

No adult-oriented establishment shall be open between the hours of 2 o'clock a.m. and 8 o'clock a.m., Monday through

Friday or between 3 o'clock a.m. and 8 o'clock a.m. Saturdays or between the hours of 3 o'clock a.m. and 12 noon on Sundays.

The ordinance contains other regulations but only section 1.06 is challenged in this litigation. Adult-oriented businesses are the only businesses in town subject to hour restrictions. Other businesses in town, including a restaurant, convenience store, and gas station, are open 24 hours. By stipulation, defendant has not enforced section 1.06 pending resolution of this litigation.

OPINION

Speech including printed matter and film that is sexually explicit but not obscene is rotected by the First Amendment. Schad v. Borough of Mt. Ephraim, 452 U.S. 61, 65-66 (1981). The Fourteenth Amendment extends this protection to state and local levels. 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996). The most exacting scrutiny is applied to regulations that suppress, disadvantage or impose differential burdens upon speech because of its content. Turner Broadcasting System, Inc., v. F.C.C., 512 U.S. 622, 642 (1994). By contrast, regulations that are content-neutral are subject to an "intermediate" level of scrutiny, because they usually pose a less substantial risk of removing certain ideas or viewpoints from the public

dialogue. Id. "A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not on others." Ward v. Rock Against Racism, 491 U.S. 781, 792 (1989). Content-neutral regulations include those that restrict the time, place, or manner of expression in order to ameliorate undesirable secondary effects of that expression.

Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986). Time, place, and manner regulations pass constitutional muster if they (1) are justified without reference to the content of the regulated speech; (2) are narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication of the information. Ward, 491 U.S. at 791.

In the Supreme Court's latest examination of the constitutional standard to be applied in scrutinizing the regulation of sexually explicit speech, Barnes v. Glen Theatre, Inc., 501 U.S. 560 (1991), no single opinion commanded a majority. Barnes concerned a municipality's attempt to regulate public nudity, including nude dancing. A plurality of the Court thought that nude dancing was speech protected by the First Amendment, but that no evidence of secondary effects was necessary to justify its regulation; rather, the government's interest in protecting "order and morality" was

sufficient justification. Id. at 569. Justice Scalia, conversely, thought that the regulation was not subject to First Amendment scrutiny because it was a general law regulating conduct not directed specifically at expression. Id. at 572 (Scalia, J., concurring). justice Souter adhered most closely to the Court's earlier decision in Renton, holding that nude dancing was subject to First Amendment protection and that some evidence was required that could show a rational basis for tile government's conclusion that (1) the regulated activity could potentially produce undesirable secondary effects and (2) the regulation might alleviate those effects. See id. at 581-87 (Souter, J., concurring).

"When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" Marks v. United States, 430 U.S. 188, 193 (quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976)). In the Marks sense, the "narrowest opinion" must represent a common denominator of the Courts reasoning it must embody a position implicitly approved by at least five justices who support the judgment." Rappa v. New Castle Coun , 18 F.3d 1043, 1057 (3d Cir. 1994) (quoting King v. Palmer, 950 F.2d 771, 781 (D.C. Cir.

1991) (en banc)). If there is no such common denominator, then the Court's next most recent opinion that commanded a majority remains the law of the land. In this instance that would be Renton. The Fifth, Sixth, and Eleventh Circuits have agreed that justice Souter's concurrence is the narrowest opinion in Barnes and have followed his concurrence in applying the ruling of that case. See J&B Entertainment, Inc. v. City of Jackson, 152 F.3d 362 (5th Cir. 1998); Triplett Grille, Inc. v. City of Akron, 40 F.3d 129 (6th Cir. 1994); International Eateries of America, Inc. v. Broward County, 941 F.2d 115 7 (11 th Cir. 199 1). It is not clear to me that justice Souter's opinion embodied a position implicitly improved by a majority of the Court. However, it is not necessary to decide whether to follow Justice Souter's concurrence in Barnes. This case can be decided by the Court's earlier holding in Renton (which, incidentally, is substantially consistent with Justice Souter's concurrence in Barnes) that evidence of secondary effects justifies content-neutral regulation. Therefore, where I refer to Justice Souter's concurrence in Barnes, it is not to follow his opinion in that case, but rather for the persuasive guidance his concurrence offers in interpreting Renton.

A local government's significant interest in preserving the quality and character of neighborhoods, preventing the

spread of disease, and preventing crime can support time, place, and manner restrictions on adult entertainment including adult bookstores, if the interest is set forth properly. L.&., Renton, 475 U.S. at 50. The local government can meet the burden of justifying its restriction either by developing evidence of secondary effects prior to enactment of the regulation or by adducing such evidence at trial. Barnes v. Glen Theatre, Inc., 501 U.S. 560, 582 (Souter, J., concurring). The local government need not conduct its own studies of secondary effects, but may rely upon the experiences of other local governments, as well as studies conducted by them, "so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem" addressed by the regulation. Renton, 475 U.S. at 52. The government is not required to show that the regulated activity actually causes the secondary effects, only that it reasonably believes that "the effects are *correlated* with the existence of such establishments." Barnes, 501 U.S. 560, 585 (Souter, J., concurring) (emphasis added).

Regulations are narrowly tailored to serve a significant government interest if the government shows that it has a reasonable basis for belief that the regulation enacted will ameliorate the correlated secondary effects in fact and the regulation is not substantially broader than necessary to

achieve its interest. See Ward, 491 U.S. at 800; J&B Entertainment, Inc. v. City of Jackson, No. 96-60865 slip op. at 10 (5th Cir. Aug. 21, 1998). Thus in order to satisfy the first two prongs of the Ward three prong test, the government is required to show (1) that it has evidence upon which to base a reasonable belief that there is a correlation between the activity regulated and the alleged secondary effect of that activity and (2) that it reasonably believes the regulation enacted ameliorates the correlated secondary effect and the regulation is not substantially broader than necessary to achieve that goal.

In reality, this not a particularly onerous burden for the government to meet. All it need do is point to studies or experiences from other towns that show a correlation between the business and the secondary effects it seeks to regulate and explain why it reasonably believes the regulation it has enacted will ameliorate those effects without being substantially broader than necessary. The question now is whether defendant has crossed this easy threshold or collapsed short of it. It is not the court's job to carry defendant across.

Phillips v. Borough of Keyport , 107 F.3d 164, 175 (3d Cir. 1997) (en banc) ("Our First Amendment jurisprudence

requires that the Borough identify the justifying secondary effects with some particularity, (and) that they offer some record support for the existence of those effects and for the Ordinance's amelioration thereof"); J&W Entertainment, No. 96-60865 slip op. at 10 (citing Renton, 475 U.S. at 48) ("On summary judgment and at trial, the government bears the burden of justifying the challenged enactment by introducing sufficient evidence"). "To insist on less is to reduce the First Amendment to a charade in this area." Phillips, 107 F.3d at 175.

Defendant manages to make its minimal showing, but not by any great margin. The ordinance it enacted cites secondary effects such as the spread of sexually transmitted diseases but cites no studies or experiences that show why the town believes such effects are correlated with Plaintiff's business. Rather, it concludes by its "nature, intended use, and design" Plaintiff's business is conducive to such effects. Mere conclusion is insufficient to pass constitutional muster: evidence upon which to base conclusion is required. See Renton, 475 U.S. 41. Further, the ordinance offers no evidence of a rational basis for belief that the hours restriction will help to ameliorate the spread of sexually transmitted diseases or any other effects it lists. Plaintiff is correct, therefore, in arguing that the ordinance itself does not offer an

evidentiary basis to substantiate defendant's claim that its ordinance is contentneutral and narrowly tailored to serve a significant government interest. However, in its submissions to this court, defendant states that it relied on the experience of West Allis,

Wisconsin, in deciding to enact that city's ordinance and that the "same factors" cited by that city in enacting its restricted hours of operation ordinance motivated defendant. West Allis relied on evidence from several other cities, including Indianapolis, Austin, Chattanooga, Detroit and Seattle, that showed a correlation between adult businesses and the secondary effect of crime. Tee &- Bee, Inc. v. City of West Allis, 936 F. Supp. 1479, 1485 n.3 (E.D. Wis. 1996). Relying on West Allis's use of evidence of secondary effects from other cities, defendant states, it reasonably believes that adult businesses are correlated with crime and that its ordinance is narrowly tailored to help ameliorate crime because "the restricted hours of operation fall within the period of time when crime is more likely to occur and law enforcement personnel are more likely to be busy with other matters." Brief in

Support of the Defendant's Motion for Summary Judgment, Dkt. #20, at 7 (quoting Tee & Bee, Inc. at 1485). just as in Renton, defendant seems to have gathered most of

its evidence" by reading prior decisions in which other municipalities were sued under similar circumstances. Regardless, just as in Renton, as "long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem," it is evidence enough. Renton, 475 U.S. at 52.. Moreover, it appears from Justice Souter's opinion in Barnes, 501 U.S. at 582, that this evidence can be developed prior to enactment of the regulation or adduced at trial (or, presumably, as in this case, on a motion for summary judgment). Barnes v. GlenTheatre, Inc., 501 U.S. 560, 582 (Souter, J., concurring). Certainly nothing in the Barnes plurality opinion would prevent the town from adducing evidence of secondary effects postenactment, since the plurality (unlike Justice Souter) would not require the town to produce any evidence at all. See Barnes, 501 U.S. at 568 ("It is impossible to discern, other than from the text of statute, what governmental interest the Indiana legislators had in mind when they enacted this statute").

Plaintiff is not convincing when it argues that defendant was actually motivated by a desire to suppress its speech because of sexually explicit content rather than by a desire to ameliorate crime or by any other of a number of factors defendant claims to have been motivated by. Even accepting Plaintiff's contention as true for purposes of

summary judgment, this court can "not strike down an otherwise constitutional statute on the basis of ail alleged illicit legislative motive." Renton, 475 U.S. at 48 (quoting United States v. O'Brien, 391 U.S. 367, 383 (1968)). The court does not ask why defendant actualy enacted its ordinance; it asks whether defendant has offered evidence that it could *have* enacted it for a content-neutral reason. See J&B Entertainment, No. 96-60865 slip op. at 10 ("We do not ask whether the regulator subjectively believed or was motivated by other concerns, but whether ail objective lawmaker could have so concluded, supported by an actual basis for the Conclusion").

> Reading about the experience of West Allis as described in Tee &- Bee, an objective lawmaker could *have* concluded that there is a correlation between adult businesses and crime and that hour restrictions are likely to help prevent crime since the hours restricted are when crime is more likely to occur and officers are more likely to be busy with other matters.
>
> Thus, defendant has shown that it has evidence upon which to base a reasonable belief of a correlation between-adult businesses and the secondary effect of crime and that it reasonably believes the regulation

enacted is narrowly tailored to ameliorate the correlated secondary effect.

Plaintiff disputes that crime is correlated with its business and more likely to occur at its business during the restricted hours in three ways. None of them is helpful to its cause. First, plaintiff offers expert testimony that crime was not correlated with adult businesses in Phoenix. Even if I admitted this testimony and accepted it as true, it could not help plaintiff. That one study says crime is not correlated with adult businesses does not mean that defendant could not reasonably believe the many studies that say it is. Second, plaintiff

insists that crime is just as or more likely to occur at other businesses open during the hours when it alone is forced to shut its doors. The question is not whether crime is more likely

to occur at plaintiff's business than other places. The quesion is whether defendant has a rational basis to believe crime is correlated with Plaintiff's business. It does, moreover, even if Plaintiff's correct, its argument simply reinforced Defendant's argument that police are less likely to be able to respond to crime at Plaintiff business because they will be

engaged elsewhere. Third, plaintiff states that one of defendant's police officers once told a Pure Pleasure employee that he was glad Pure Pleasure was open during the restricted hours because it helped prevent crime. Even ignoring the obvious hearsay problem in this statement, it is difficult to imagine how this is relevant. The court does not ask whether the police think the regulation will help prevent crime. The court does not even ask whether the town board thinks the regulation will help prevent crime. The court asks whether the board has cited evidence that could have provided a rational basis for belief that the ordinance might help prevent crime. The board has done so, and no more is required.

Finally, defendant asserts, and plaintiff does not dispute, that the hours restriction leaves open ample alternative channels for communication of the Plaintiff's sexually explicit expression. For example, defendant argues, plaintiff can operate its store during regular business hours and via the Internet when it is closed. Because plaintiff does not respond to this assertion, I will assume it concedes the issue.

The regulation is justified without reference to the content of the regulated speech, because its

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purpose is to curb the secondary effect of crime, which plaintiff could reasonably believe is correlated with Plaintiff's business, in light of West Allis's evidence. The regulation is narrowly tailored to serve the significant government interest of preventing crime when it is most likely to occur and when law enforcement is least capable of responding to it, while allowing plaintiff to operate unfettered at all other times. The regulation leaves open ample altetnative channels for communication of Plaintiff's speech. Thus, Defendant's regulation has satisfied the three-part Ward test and is constitutional. Defendant is entitled to summary judgment. Thus Defendant asks that Plaintiff be requred to pay attorney fees and costs because "there is no precedential foundation present which would prevent [plaintiff's claim] from being ound to be frivilous" what this is supposed to mean is unclear. Defendant and Plainiff have cited a large body of "precedential foundation" regarding similar time, place and manner restrictionss on sexually explicit speech. In a few of those caeses, on similar facts, the Plaintiff business won; in most, the Defendant town won. In no case was the loser's claim deemed frivolous. Thereis no reason to deem it

so here. Plaintiff's motion will be denied.

ORDER

IT IS ORDERED that

1. The motion of defendant Town of Hallie for summary judgment is GRANTED;

2. The motion of defendant Town of Hallie to strike portions of plaintiff DiMa Corporation's affidavit testimony is DENIED as moot;

3. The motion of defendant Town of Hallie for attorney fees and costs is DENIED;

4. The clerk of court is directed to enter judgment for defendant Town of Hallie and close this case.

Entered this 14th day of October, 1998.

BY THE COURT:

_____

BARBARA B. CRABB

District Judge

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

DiMa, Corporation, a
Minnesota corporation,

Plaintiff,

COMPLAINT

vs.

Court File No.

The Town of Hallie,

Defendant.

The above-named Plaintiff, for its Complaint against Defendant, hereby alleges the following:

JURISDICTION

1. Jurisdiction of this Court is based on 28 U.S.C. Secs. 1343(3), 2201-2202; Title 42 U.S.C. Sec. 1983; and the Constitution of the United States, in particular the First and Fourteenth Amendments thereto, this being an action authorized by law to redress the deprivation, under color of state law, ordinance, statute, regulation, customs and usage, of rights, privileges and immunities guaranteed to Plaintiff by the

Constitution of the United States

PARTIES

2. Plaintiff DiMa Corporation is a corporation organized under the laws of the State of Minnesota.

3. Defendant Town of Hallie is a town organized under the Laws of the State of Wisconsin.

CAUSE OF ACTION

4. Plaintiff operates a business within the Town limits of Hallie, Wisconsin, known as "Pure Pleasure." Said business is an adults-only bookstore, featuring the sale of non-obscene sexually explicitly books, and magazines, and the exhibition of non-obscene sexually explicit video tapes in private viewing booths.

5. As such, the activities of the store are presumptively entitled to constitutional protection under the First and Fourteenth Amendments to the United States Constitution.

6. On March 2, 1998, the Town Board of the Town of Hallie enacted ordinance No. 98-1, a copy of which is attached hereto as Exhibit A and incorporated by reference as if fully set forth herein.

7. In enacting said ordinance the town of Hallie acted under color of state law, statute, ordinance, regulation, custom and usage, within the meaning of Title 42 U.S.C. Sec.

8. The purpose and intent of said ordinance is set forth in Sec. 1.02 thereof as follows:

> "The Town Board finds that adults-oriented establishments may by their nature, design and intended use be conducive to high-risk sexual behavior and constitute a potential disturbance to the public peace and good order. High-risk sexual behavior has the potential of exposing persons to among other things, the Human Immunodeficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS). AIDS is currently determined to be irreversible and uniformly fatal. The operation of such establishments, although protected to a certain degree as an exercise of free speech rights under the State and Federal Constitutions, is also found to present a potential for disorderly and anti-social behavior requiring, for the good of the residence of the Town, that the Town Board regulate this type of activity. This section is created to provide minimum standards for such adults-oriented establishments in order to protect the general health, safety and welfare of the citizenry, by regulating those features of adult-oriented establishments which tend to facilitate and promote high-risk sexual behavior and by providing regulations which aid in the surveillance and detection of unlawful activities within such premises. It shall be the further purpose of this ordinance to protect and promote the public peace and good order through regulation of the conduct of business of adult-oriented establishments."

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9. Under Sec. 1.03 of said ordinance, the following definitions were adopted:

> "(1) 'Adult-oriented establishment' means, but is not limited adult bookstores, adult motion picture theaters and any other premises to which public patrons or members are invited or admitted and which are so physical arranged as to provide booths, cubicles, rooms, compartments or stalls separate from the common areas of the premises for the purposes of viewing adult-oriented video tapes, films, motion pictures, or other offered adult entertainment, whether or not such adult entertainment is held, conducted, operated or maintained for a profit, direct or indirect.
>
> (2) 'Adult bookstore' means an establishment having as its stock in trade, for sale, rent, lease, inspection or viewing books, films, video cassettes, motion pictures, magazines, or other periodicals which are distinguished or characterized by their emphasis depicting, describing or relating to specific sexual activities or specified anatomical areas, and in conjunction therewith have facilities for the presentation of adult entertainment, including adult-oriented video tapes, films, or motion pictures or other offered entertainment for observation by patrons therein...
>
> (8) 'Specified sexual activities' means simulated or actual:
>
> > (a) Showing of human genitals in a course of sexual stimulation

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or arousal;

(b) Acts of masturbation, sexual intercourse, sodomy, bestiality, necrophilia, sado-masochistic abuse, fellatio, or cunnilingus;

(c) Fondling or erotic touching of human genitals, pubic region, buttock or female breasts.

(9) 'Specified anatomical areas' means:

(a) Less than completely and opaquely covered human genitals, public region, buttocks and female breast below a point immediately above the top of the areola.

(b) Human male genitals in a discernible turgid state, even if opaquely covered."

10. "Pure Pleasure," operated by Plaintiff, is a "adult-oriented establishment," or "adult bookstore" within the meaning of the ordinance.

11. Sec. 1.06 of said ordinance provides as follows:

"No adult-oriented establishment shall be open between the hours of 2 o'clock a.m. and 8 o'clock a.m., Monday through Friday or between 3 o'clock a.m. and 8 o'clock a.m. Saturdays or between the hours of 3 o'clock a.m. and 12 noon on Sundays."

12. Adult-oriented establishments, such as that operated by Plaintiff are the only businesses within the Town of Hallie subject to such closure regulations.

13. Numerous other businesses within the City of Hallie are permitted to and do in fact remain open 24 hours per day.

14. Sec. 1.06 of Hallie Town Ordinance No. 98-1 is facially unconstitutional and unconstitutional as applied to Plaintiff's business on the following grounds:

(a) Because the Town Board enacted the ordinance without any empirical evidence that adult-oriented establishments open between the hours of 2:00 a.m. and 8:00 a.m. Monday through Friday between 3:00 a.m. and 8:00 a.m. Saturdays and 3:00 a.m. and noon on Sundays cause any adverse secondary effects not caused by other businesses permitted to be open during the same hours, the ordinance is an unlawful content-based prior restraint on freedom of expression, in violation of the First and Fourteenth Amendments to the United States Constitution.

(b) The ordinance further deprives Plaintiff of equal

protection of the laws, in violation of the First and Fourteenth Amendments to the United States Constitution.

15. As a result, Plaintiff is entitled to a declaratory judgment declaring Sec. 1.06 of Hallie Town Ordinance 98-1 to by unconstitutional, both facially and as applied.

EQUITY AND IRREPARABLE INJURY

16. Plaintiff realleges that allegation set forth in Paragraphs 1 through 15, supra.

17. Pursuant to Section 3 of the ordinance, the ordinance is to take effect within 30 days after adoption and publication.

18. Under Sec. 1.10(2) of the ordinance, an adult-oriented business operated in violation of the ordinance is subject to forfeiture in the amount of $1,000 per day,

19. As a result, Plaintiff faces irreparable injury, in that Plaintiff is required either to forfeit rights guaranteed by the First and Fourteenth Amendments to the United States Constitution or subject itself to substantial penalties, in the alternative.

20. Plaintiff has no adequate remedy at law.

21. Consequently, Plaintiff is entitled to a preliminary and permanent injunction enjoining enforcement of Sec. 1.06 of ordinance 98-1.

WHEREFORE, Plaintiff requests the judgment and decree of this Court as follows:

a. That this Court enter a declaratory judgment declaring Sec. 1.06 of Hallie Town Ordinance No. 98-1 to be facially unconstitutional and unconstitutional as applied to Plaintiff.

b. That this Court enter a preliminary and permanent injunction, and until a hearing can be had on a motion for preliminary injunction, and temporary restraining order, restraining and enjoining Defendant from taking any action to enforce the provisions of Sec. 1.06 of ordinance No. 98-1 against Plaintiff.

c. That Plaintiff be awarded its reasonable costs, disbursements, and attorney's fees, pursuant to Title 42 U.S.C. Sec. 1988.

d. That the Court grant such other and further relief as it may deem just, fair, and equitable.

RANDALL TIGUE LAW OFFICES, P.A.

_____

Randall D.B. Tigue, Esq.
Attorney for Plaintiff
2901 Pleasant Avenue South
Minneapolis, MN 55408
(612) 874-9903

Dated: 4/1/98

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VERIFICATION

Malcolm W. Prinzing, being first duly sworn on oath, hereby deposes and says that he is the President of Plaintiff DiMa Corporation, that he has read the foregoing Complaint, and that the allegations contained therein are true, except as to those matters stated upon information and belief, and that, with respect to such matters, he believes them to be true.

_____

Malcolm W. Prinzing

Subscribed and sworn to
before me this____day of
April, 1998

_____

Notary Public

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ORDINANCE # 98 -1 Exhibit A

To Adopt Ordinance #140, Section I (Adult Oriented-Establishments);

To Amend Ordinance #113 (Public Nuisance)

The Town Board of the Town of Hallie Hereby Ordains as Follows:

Section 1: That Town Ordinance #140, Section 1 be created to read:

Sub Section

1.01 Authority.

1.02 Purpose and intent.

1.03 Definitions.

1.04 Health regulations of adult-oriented establishments.

1.05 Minors not to be allowed on premises of adult-oriented establishment.

1.06 Hours of operation regulated.

1.07 Consumption of alcoholic beverages on business premises prohibited.

1.09 Inspection.

1.09 Application of Section.

1.10 Penalty.

1.11 Severability.

1.01 Authority. This Ordinance is adopted pursuant to the authority vested in the Board pursuant to Sec. 60.10 (2)(c), 60.22 (3) and 60.23 (23), Wisconsin Statutes.

1.02 Purpose and Intent. The Town Board finds that adult-oriented establishments their nature, design and intended use to be conducive to high-risk sexual behavior and constitute potential disturbance to the public peace and good order. High-risk sexual behavior has the potential of exposing persons to, among other things, the Human Immuno deficiency Virus (HIV) and Acquired Immune Deficiency Syndrome (AIDS). AIDS is currently determined to be irreversible and fatal. The operation of such establishments, although protected to a certain degree as an exercise of free speech rights under the State and Federal Constitutions, is also found to present a potential for disorderly and anti-social behavior requiring, for the good of the residents of the Town, that the Town Board regulate this type of activity. This section is created to provide minimum standard for such adult-oriented establishments in order to protect the general health, safety and welfare, citizenry, by regulating those features of adult-oriented establishments which tend to facilitate and promote high-risk sexual behavior and by providing regulations which aid in the surveillance detection of unlawful activities within such premises. It shall be the

further purpose of this ordinance to protect and promote the public peace and good order through regulation of the conduct of businesses of adult-oriented establishments.

In this section the following words and phrases shall have the meaning indicated, unless the context expressly requires otherwise:

(1) "Adult-oriented establishment' means, but is not limited to, adult bookstores, adult motion picture theaters and any other premises to which public patrons or members are invited or admitted and which are so physically arranged so as to provide booths, cubicles, rooms, compartments or stalls separate from the common areas of the premises for the purposes of viewing adult-oriented videotapes, films, motion pictures, or other offered adult entertainment, whether or not such adult entertainment is held, conducted, operated or maintained for a profit, direct or indirect.

(2) "Adult bookstore" means an establishment having as its stock in trade, for sale, rent, lease, inspection or viewing books, films, video cassettes, motion pictures, magazines or other periodicals which are distinguished or characterized by their emphasis on matters depicting, describing or relating to specific sexual activities or specified anatomical areas, and in conjunction therewith have facilities for the presentation of adult entertainment, including adult-oriented videotapes, films, motion pictum or other offered entertainment for observation by patrons therein.

(3)"Adult motion picture theater means an enclosed building used for presenting materials having as its dominant theme, or distinguished or characterized by in emphasis on, matters depicting, describing or relating to specified sexual activities or specified anatomical areas, for observation by patrons therein.

(4) "Adult entertainment' means any exhibition of any videotape, film or motion picture of any type, which has as its dominant theme, or is distinguished or characterized by an emphasis on any actual or simulated specified sexual activities or specified anatomical areas.

(5) "Door, curtain or portal partition, means a nontransparent closure device which prevents activity taking place within a booth, room or cubicle from being seen or viewed.

(6) "Operator" any person operating, conducting, maintaining or owning any adult-oriented establishment.

(7) 'Specified sexual activities" means simulated or actual:

(a) Showing of human genitals in a state of sexual stimulation or arousal,
(b) Acts of masturbation, sexual intercourse, sodomy, bestiality, necrophilia sado-masochistic abuse, fellatio or cunnilingus,
(c) Fondling or erotic touching of human genitals, pubic region, buttock or female breasts.

(8) ' Specified anatomical areas'

(a) Less than completely and opaquely covered human genitals, pubic region, buttocks and female breast below a point immediately above the top of the areola

(b) Human male genitals in a discernibly turgid state, even if opaquely covered.

(9) Business premises shall include property owned or leased or otherwise controlled by the adult-oriented establishment and contiguous with the building or other structure housing the adult-oriented establishment and shall include but not be limited to parking lots or sidewalk approaches.

3.04 Regulation of Adult-Oriented Establishments

(1) Any adult-oriented establishment having available for customers, patrons or members any booth, room, or cubicle for the private viewing of any adult entertainment shall comply with all of the following requirements:

(a) Each such booth, room or cubicle shall be totally accessible to and from aisles and public areas of the adult-oriented establishment, and shall be unobstructed, in total or in part, by any door, curtain or portal partition.

(b) Each such booth. room or cubicle shall:

1. Be separated from all adjacent booths, moms and cubicles and any non-public areas by a partition. All partitions shall be solid and without any openings, and shall extend from the floor to a height of not less than 6 feet. All partitions shall be light colored, non-absorbent, smooth textured and easily cleanable.

2. Have at least one side totally open to a public lighted aisle so that there is an unobstructed view at all times of anyone occupying such booth. room or cubicle.

3. Have a floor which is light colored, non-absorbent, smooth and easily cleanable.

4. Be lighted in such a manner that a person in the booth, room or cubicle is reasonably visible from the adjacent public rooms or areas, but such lighting shall not be of such intensity as to prevent the viewing of videotapes, motion pictures or other offered entertainment.

(c) No more than one person shall occupy any such booth, or cubicle at my time. No occupant of any such booth, room or cubicle shall engage in any sexual activity, or cause any bodily discharge, or litter while in the booth, room or cubicle. No person shall alter, damage or deface any portion of any such booth, room or cubicle in such a manner that it no longer complies with the provisions of this chapter.

(d) The premises of the adult-oriented establishment shall be maintained in a clean and sanitary manner at all times.

3.05 Minors Not to be Allowed on adult-Oriented Establishment. No minor shall be allowed to enter or remain inside an adult-oriented establishment or be permitted to loiter on the business premises. For the purpose of this ordinance the prohibition against loitering an the business premises shall include situations in which parents, guardians or other physical custodians enter or remain inside an adult-oriented establishment while leaving minor children who arc in their care or charge or custody outside of the building or structure, in or outside of motor vehicles.

3.06 Hours of Operation Regulated. No adult-oriented establishment shall be open between the hours of 2 o'clock a.m. and 8 o'clock a.m.,

Monday through Friday or between 3 o'clock a.m. and 8 o'clock a.m. Saturdays or between the hours of 3 o'clock a.m. and 12 noon on Sundays.

3.07 Consumption of Alcoholic Beverages on Business Premises Prohibited on Business Premises Prohibited. No person shall consume alcoholic beverages on the business premises of an adult-oriented establishment.

3.08 Application of Section Each adult-oriented establishment shall be open to inspection at all reasonable times by the Town Police Department, Fire Department, Health and Fire Department and Building Inspector

3.09 Application of Section. The standards established in this section shall not apply to buildings, structures or premises which are lawfully operating as hotels, motels, apartment complexes or condominiums.

3. 10 Penalty.

(1) Every act or omission by an employee considering a violation of the provisions of this section shall be deemed the act or omission of the operator if such act or omission occurs either with the authorization, knowledge, or approval of the operator or as a result of the operator's negligent failure to supervise the employee's conduct. In such event, the operator shall be punishable under subsection (2) for such act or omission in the same manner as if the operator committed the act or caused the omission.

(2) Any person who violates, or knowingly allows or permits any violation of, any provision of this chapter, or any person who operates or permits the operation of any adult oriented establishment in violation of this chapter. shall forfeit an amount Not exceeding S1.000 for each offense. Each day, or portion thereof, that a violation of this chapter exists or continues to exist shall constitute a separate offense.

Section 3:That this Ordinance shall be deemed effective upon its adoption and publication as required by law. That this section not

be codified. A.54

Dated this _ day of December, 1997.

TOWN BOARD, TOWN OF HALLIE
CHIPPEWA COUNTY, WISCONSIN

by:_____
by:_____

by:_____

by:_____

by:_____

Attest:

_____
1st reading February 16, 1998
2nd reading_____
publication_____

A55

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

DiMa, Corporation, a
Minnesota corporation,

Plaintiff,

AFFIDAVIT OF
WILLARD OLSON

vs.

The Town of Hallie,

Defendant.

STATE OF MINNESOTA)
)SS
COUNTY OF HENNEPIN)

Willard Olson, being first duly sworn on oath, hereby deposes and says the following:

1. Your affiant is the General Manager of DiMa Corporation, Plaintiff in the above-entitled action.

2. As such, your affiant has sought out the documentary history of the enactment of ordinance No. 98-1.

3. Attached hereto as Exhibit A is a true and correct copy of the Minutes of the Hallie Town Board of

February 16, 1998, at which ordinance No.98-1 received its first reading.

4. Attached hereto as Exhibit B are the Minutes of the meeting of the Town of Hallie on March 2, 1998, at which ordinance No. 98-1 was finally adopted.

5. Your affiant has personally examined the town ordinances of Hallie and has determined that there are no ordinances adopted by the Town of Hallie restricting the hours of any other business other than that operated by Plaintiff.

6. Your affiant has further determined that there are several businesses within the Town of Hallie operating 24 hours per day. These include:

a. Kwik Trip, 2209 Highway 53 North.

b. Heckel's Cafe, 2621 Highway 53 North.

c. Holiday Station, 2750 120th Street.

7. Both the Kwik Trip and Holiday Station sell off-sale beer and cigarettes, which could be subject to theft during the earlier hours of the morning, something not present at the Pure Pleasure store.

8. In addition, being open 24 hours is a necessity of Pure Pleasure, simply because of security purposes, in that other Pure Pleasure stores which have not been permitted to be open 24 hours per day have been subjected to vandalism during off hours, presumably by persons opposed to the type of business

that Pure Pleasure operates.

9. The Pure Pleasure store has been open for business since December 18, 1997, meaning the store has been open in excess of three months.

10. During that period of time, the only occasion in which law enforcement was required to come to the premises occurred when store personnel caught a part-time independently contracting construction worker attempting to steal money from the store.

11. Indeed, far from creating a problem for law enforcement, having the store open 24 hours a day has, in fact, assisted law enforcement, not only by preventing the vandalism as described in Paragraph 8, supra, but also, as testified to by your affiant before the Hallie Town Board, being available to assist motorists who run off the road during inclement weather in the winter.

12. Your affiant has had occasion to observe late-night traffic, not only at Plaintiff's establishment, but at Kwik Trip, the Holiday Station, and Heckel's Cafe, all of which are open 24 hours per day. Your affiant has not been able to observe any difference either in the volume or nature of the traffic between Plaintiff's establishment and any of these exempted establishments. 13. Pure Pleasure is located in an industrial area, with only a single non-conforming house

in the vicinity. Immediately across Highway 52 from Pure Pleasure store is a tank farm, from which trucks go in and out at all hours of the night. The tank farm generates far more traffic noise than does Pure Pleasure.

14. Even as to the non-conforming house, there is no immediate pedestrian access to the yard of that house, without walking through underbrush. All other residential neighborhoods are located far down the road, or on the other side of a four-lane highway. As a practical matter, they may be accessed only by vehicle, and not on foot.

15. If anything, customers are far less likely to litter with products from the Pure Pleasure store, than from product purchased at the convenience stores, which are open 24 hours a day. The cheapest merchandise sold at Pure Pleasure are monthly magazines such as Playboy, Penthouse, and Hustler, which sell for $5.00. The more sexually explicit magazines come in packs which range in price from a low of $8.99 to a high in excess of $20.00. People spending that kind of money on magazines are very unlikely to throw them away as soon as they walk out the door. Litter has never been a problem around any Pure Pleasure store.

16. By contrast, convenience stores sell daily newspapers and other relatively inexpensive products, which are far more likely to wind up as litter than do any products sold at

Pure Pleasure. A59

17. Your affiant executes this Affidavit in support of the attached Motion for Preliminary Injunction and Temporary Restraining Order.

_____
Willard Olson

Subscribed and sworn to
before me this_____day of
April, 1998

_____
Notary Public

A 60

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

DiMa CORPORATION,

Plaintiff,

vs.

THE TOWN OF HALLIE,

Case No. 98 C 240 C

Defendant.

AFFIDAVIT OF GARY MISFELDT

STATE OF WISCONSIN)
) ss.
EAU CLAIRE COUNTY)

Gary Misfeldt, being first duly sworn, states and deposes as follows:

1. That affiant is an adult individual residing in the Town of Hallie, who at all times relative to this action has served and is serving as the Chairman of the Town Board of Hallie.

2. That on or about December 15, 1997, affiant learned that DiMa Corporation would be locating a business at the vacant Hamm's Cheese House in town.

3. That at a Hallie Town Board meeting on December 15, 1997, affiant advised the Board that DiMa had applied for a license to sell tobacco but was unaware of the type of business DiMa intended to operate. See, Town Board Minutes for 12/15/97, attachment A hereto.

4. That between 12/15/97 and 12/19/97, affiant attempted to learn the nature of DiMa's business plan for Hallie and found out that Malcolm Prinzing intended to operate an adults-only store selling sexually explicit material.

5. That affiant was concerned about the nature of DiMa's proposed business in Hallie and immediately contacted the Town's attorney, William G. Thiel, to request information and advice about the Town's regulatory authority over adult-oriented businesses.

6. That Attorney Thiel generally advised the Board at a meeting on December 19, 1997, about the Board' s regulatory power over adult-oriented businesses and indicated specifically to the Board that he would research whether the Board could regulate hours of operation. See, Town Board Minutes of 12/19/97, attachment B hereto.

7. That during the meeting on December 19, 1997, the Board received public commentary, including input from representatives of plaintiff's business.

8. That on December 19, 1997, the Board received information from Attorney Thiel about the City of Eau Claire's experience in regulating adult oriented businesses which sell sexually explicit material.

9. That at the end of the meeting on December 19, 1997, the Board directed Attorney Thiel to propose a regulatory ordinance consistent with the Board's power and authority.

10. That on January 19, 1998, Attorney Thiel presented a written opinion to the Board regarding its power to regulate adult-only establishments. See, Town Board Minutes for 1/19/98, attachment C hereto.

11. The Board reviewed Attorney Thiel's opinion, including a description of the regulatory efforts of West Allis, Wisconsin, and directed him to prepare a draft ordinance for the Board to consider.

12. That at a public board meeting held on February 16, 1998, the Board reviewed and considered a proposed ordinance regulating adult-oriented businesses and heard public comments. See, Town Board Minutes 2/16/98, attachment D.

13. That during the 2/16/98 meeting the ordinance was read through, discussed and returned to Attorney Thiel with questions and comments for modification.

14. That at the end of the 2/16/98 meeting the matter of the ordinance was tabled and placed on the agenda for March 2, 1998.

15. That at a public meeting on March 2, 1998, a final version of the ordinance regulating adult-oriented businesses was presented to the Board for its review. See, Town Board Minutes 3/2/98, attachment E.

16. That after an opportunity for public comment and input from representatives of DiMa, the Board made final modifications to the ordinance and approved it, as modified, by a unanimous vote on March 2, 1998.

17. That on March 2, 1998, representatives of DiMa requested a change in the hours of operation provision but this request was denied.

18. That on April 6, 1998, at a public hearing, representatives of DiMa again requested a change in the ordinance striking the hours of operation provision; the request was denied because the Board felt the hours provision was reasonable and enforceable. See, Town Board Minutes 4/16/98, attachment F.

19. That DiMa's representatives advised that they would sue the Town of Hallie unless the hours provision of the ordinance was stricken.

20. That affiant attended each of the Board meetings identified above as set forth in the attached Town Board Minutes and among other things the Board enacted Town Ordinance #140 based upon the following listed factors:

a. The impact 24-hour-a-day adult-oriented establishments would have on the Town's police department.

b. The impact 24-hour-a-day adult-oriented establishments would have in raising the potential for criminal activity

c. Loitering by minors or the presence of minors at or in proximity to 24-hour-a-day adult-oriented establishment.

d. The impact 24-hour-a-day adult-oriented establishments would have in potentially increasing the incidence of sexually transmitted disease (STD).

e. The impact 24-hour-a-day adult-oriented establishments would have upon the quality of life in the Town of Hallie (i.e., potential harm to children in the area due to proximity with Town park and recreation area).

f. The experience of the Wisconsin Cities of Eau Claire and West Allis by modeling

Hallie's ordinance upon their ordinances.

g. Reliance upon the Town attorney's legal opinion which defined the limits of the Town's Constitutional power and regulatory authority considering the First Amendment rights of the plaintiff and appropriate state and federal case precedent, including cases from the United States Supreme Court.

21. That this affidavit is made in good faith upon personal knowledge and is in support of the Town's motion for summary judgment.

Further your affiant sayeth not.

_____

Gary Misfeldt

Subscribed and sworn to before me
this _____ day of July, 1998

_____

Notary Public
State of Wisconsin
My Commission Expires:

A. 68

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

DiMa CORPORATION,

Plaintiff,

vs.

THE TOWN OF HALLIE,

Case No. 98 C 240 C

Defendant.

AFFIDAVIT OF WILLIAM G. THIEL

STATE OF WISCONSIN)
) ss.
EAU CLAIRE COUNTY)

William G. Thiel, being first duly sworn, on oath deposes and states:

1. That he is the duly appointed attorney as and for the Town of Hallie, a Wisconsin quasi-municipal corporation organized under Ch. 60, Wis. Stats., and situated in Chippewa County, Wisconsin.

2. That in his capacity as Town Attorney, this Affiant was contacted by Gary Misfeldt, Town Chairman, and was requested to attend a special Town Board meeting

scheduled to be held on December 19, 1997. That the reason Chairman Misfeldt gave for requesting this Affiant's attendance was the potential that discussion and/or action might ensue at said meeting regarding the opening of an adult-oriented establishment and bookstore in the Town of Hallie.

3. That upon initial contact with Chairman Misfeldt and per his request, this Affiant performed initial research relative to the ability of the Town to regulate this type of business establishment. That this Affiant is personally aware of the fact that the Town Board of the Town of Hallie possesses village powers under Wisconsin law and, as such, has the ability to enact police power type of regulations, beyond those specified at Ch. 60, Wis. Stats., which regulations are designed, in accord with section 61.34(1) and (5), Wis. Stats., to be for the general welfare, peace, good order, safety and prosperity of the residents of the Town. That based upon this Affiant's understanding of concerns of the Town Board Chairman relative to the opening of this establishment and the possibility that it may become a conduit for the spread of sexually transmitted diseases, this Affiant prepared a draft Ordinance modeled on a similar Ordinance adopted by the City of Eau Claire, Wisconsin, to regulate, from a public health standpoint, the use of video viewing booths within such an establishment. Thereafter, this Affiant did present such draft Ordinance to the

Defendant Town Board at its special meeting of December 19, 1997.

4. That this Affiant did attend the December 19, 1997 meeting of the Town of Hallie Town Board. That a discussion ensued at said meeting, both by and among members of the Town Board relative to the granting of a permit to the Plaintiff corporation in the instant lawsuit with regard to the operation of said business (a tobacco sales permit) and among citizens and other persons present at said meeting, with the permission of the Town Board, relative to the operation in the Town of Hallie of the business that is the subject of this lawsuit. That among the topics discussed at said meeting were citizen concerns as to the impact of the business in question upon the youth in the community and the desirability or lack thereof of this type of business being infused into the community. A representative or representatives of the Plaintiff corporation advised the Board that the business would be open 24 hours per day; that there would be no live dancing or modeling; that it would provide adult videos for view on the premises, in viewing booths; that one-third of the store would be devoted to merchandise for sale and rent and that the Plaintiff decided to place its business at this location based upon some form of market surveys, there being an apparent market in the Chippewa

Falls - Eau Claire metropolitan area for the services and products which it proposed to purvey from this location.

5. That members of the Town Board requested this Affiant to apprise it of its ability to regulate, including but not limited to the impact of First Amendment, free speech rights under the Constitution. That this Affiant did specifically advise the Town Board that it could not ban this type of business from the Town but that, subject to limitations, it could engage in regulation of it. This Affiant did advise the Board of applicable state statutes, including but not limited to §944.21, Wis. Stats., which prohibits towns from establishing obscenity standards. That he did advise it of its ability to regulate as to health concerns and that there are limitations under the First Amendment on the nature of regulations which it could impose. That this Affiant did describe to the Town Board that his draft Ordinance pertained to health concerns and, in a related vein, public nuisance considerations.

6. That members of the Town Board discussed whether or not the Town should consider regulating this type of business. That members of the Town Board realized that the Town could not ban or, from a free speech standpoint, directly suppress an exchange of information by virtue of adoption of regulatory ordinances. That among the areas of discussion engaged in by the Town Board at this meeting as to potential

regulation were the following: (1) the ability of the Town to regulate hours of operation; (2) problems associated with loitering; (3) problems associated with juveniles having access to the business establishment; (4) the size and location of signs advertising the presence of the business; (5) the possibility that live performances would occur on the premises; (6) the amount of business generated between 12 midnight and 8 a.m.; (7) health concerns relative to the spread of AIDS and/or other sexually transmitted diseases; (8) parking; (9) lighting within the facility; (10) proximity of the business to the Town park and recreation area (frequented by many children) and access street thereto (40th Avenue) and (11) access thereto for inspection purposes by the Police Department and other emergency personnel.

7. That the Town Board and this Affiant did discuss and that the Town Board was aware at this meeting that zoning controls over the location of the subject business were exercised by Chippewa County. Accordingly, the discussion as to possible regulations revolved about concerns under the police power about impacts of this type of business which might be dealt with under Town Ordinances and that the Town Board understood that the issue of where the Plaintiff has located its business was not subject to its regulatory authority.

8. That Gale Haas, the Chief of Police for the Town, was in attendance at this meeting and did express several concerns, among which were potential parking problems, access to the business premises for inspection purposes and the concept that it would be open 24 hours per day.

9. Pursuant to the request of the Defendant Town Board, the undersigned did perform legal research and issued an opinion to the Town Board regarding the type of regulation which the Town Board might engage in. Part and parcel of said research was reference, to the Town Board's attention, of case law generated in the Seventh Circuit Court of Appeals as well as in District Courts and, in particular, an Ordinance generated by the City of West Allis, Wisconsin and the results of a challenge to said Ordinance found in the case of Tee and Bee, Inc. v. City of West Allis, 936 F.Supp. 1479 (E.D. Wis. 1996). [See attached opinion letter, Exhibit "A".]

10. That at its January 19, 1998 meeting, the Town Board discussed this Affiant's written advice to it (Exhibit "A") as well as further oral advice from him. That the Town Board continued to express concerns about health, children loitering or being left in cars, and hours of operation. That it informally decided not to pursue licensure of the business nor of its employees. That at the end of the meeting this Affiant was

informally requested to revise and expand his original draft Ordinance.

11. That in rendering advice to the Defendant Town Board this Affiant did review and analyze numerous federal court decisions [see attached Exhibit "B", a file memo] that in this process this Affiant did consider the fact that a number of other municipalities did enact regulations of the types being considered by the Defendant Town Board and that these regulations were upheld by federal courts. At the conclusion of this meeting the undersigned was requested to formulate further advice and/or draft legislation for consideration by the Town Board in January 1998.

12. That after the January 19, 1998 meeting of the Defendant's Town Board, this Affiant did prepare a more extensive police power Ordinance than he had previously presented to the Town Board at its meeting of December 19, 1997. That said expanded draft Ordinance was based upon his perception of the areas which the Town Board wished to regulate, if legally possible, and was further based upon his knowledge and application of federal case law concerning regulation of the operation of adult-oriented establishments. That, specifically, the Town Board desired to engage in regulations of the following in addition to the health regulations previously presented to it in this Affiant's initial draft

Ordinance: (1) hours of operation, requiring closure at approximately the same time as bars are to close; (2) the presence of juveniles on the premises; (3) regulation of use of alcoholic beverages on premises; (4) inspection rights for police and other personnel.

13. That in drafting the Ordinance ultimately adopted by the Town Board, both in its original form and, as revised thereafter, this Affiant did take into consideration the following: (1) comments of audience and Town officials at meeting of December 19, 1997; (2) specific requests of Town Board as to potential areas of regulation that it wished to explore; (3) case law construing the First Amendment rights of adult-oriented businesses vis-a-vis regulation at the hands of local authorities; such as the Town of Hallie Town Board; (4) specific Ordinances adopted by other municipalities, regulating adult-oriented businesses.

14. That among the cases reviewed by this Affiant was the decision in Tee and Bee, Inc. v. City of West Allis, supra, in which an Ordinance of the City of West Allis was construed. That relative to the type of Ordinance drafted by this Affiant, generally, and the specific components; to-wit, health regulations, regulation of hours, access to municipal officials for inspection purposes and regulations of alcoholic

beverages and juveniles, said case, which upheld a City of West Allis Ordinance, was relied upon by this Affiant.

15. That this Affiant's review of case law construing regulations of adult-oriented businesses led him to the conclusion that regulations which do not directly impact upon and impermissibly chill First Amendment rights are permissible if they constitute a valid time, place or manner type of restriction. That, as such, governmental bodies may impose reasonable restrictions on the time, place or manner of protected speech, provided that such restrictions are justified without reference to the content, are narrowly tailored to serve a significant governmental interest and leave open ample alternative channels for communication of the information. That, as based upon his training and experience as an attorney and as based upon the case law reviewed, this Affiant reasonably believed, subject to the determination of this Court, that the Ordinance drafted constituted a content neutral, manner restriction type of Ordinance. By Affiant's design, the only impact of the Ordinance upon freedom of expression is incidental in nature. Further, that the Ordinance in question promotes a substantial governmental interest which would be achieved less effectively absent the regulation; to-wit, health,

safety and welfare concerns of the Town Board of the Town of Hallie.

16. That, further, as based upon his review of the case law pertaining to this type of regulation of adult-oriented businesses, this Affiant was led to a professional opinion and understanding that in furtherance of such governmental interests as the public health, safety and welfare, a governmental body could be guided by the experience of other municipalities engaged in such regulation and the bases upon which their regulations have been adopted. That in this respect, in drafting the Ordinance in question, this Affiant did specifically take into consideration the facts and circumstances set forth in Tee and Bee, Inc. v. City of West Allis, supra, as underlying the City's regulations, the statement of purpose for said Ordinance, together with facts and circumstances set forth in other Federal Court cases construing this type of regulation relative to the specific types of regulations sought to be engaged in by the Town Board of the Town of Hallie.

17. That in drafting the Ordinance in question, this Affiant did expressly review and analyze and, as a result of said analysis, did incorporate provisions, subject to editing to meet the Town of Hallie's needs, from both the regulatory Ordinances of the City of West Allis and of the City of Eau Claire.

A76

18. That prior to the time that the Town Board of the Town of Hallie adopted the Ordinance drafted by this Affiant, it did take into consideration this Affiant's legal advice, both orally at the meetings of December 19, 1997 and on January 19, 1998 and in writing, set forth in the letter to the Town Board from this Affiant dated January 5, 1998.

Dated this _____ day of July, 1998.

_____
William G. Thiel

Subscribed and sworn to before me
this _____ day of July, 1998

_____
Joel L. Aberg, Notary Public
Eau Claire County, State of Wisconsin
My Commission is permanent.

A39

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

DiMa, Corporation, a
Minnesota corporation,

Plaintiff,

AFFIDAVIT OF RANDALL D.B. TIGUE

vs.

The Town of Hallie, Court File No. 98-C-240-C

Defendant.

STATE OF MINNESOTA)
)SS
COUNTY OF HENNEPIN)

Randall D.B. Tigue, being first duly sworn on oath, hereby deposes and says the following:

1. Your affiant is the attorney for Plaintiff in the above-entitled matter.

2. As part of informal discovery, pursuant to Rule 26(f) of the Federal Rules of Civil Procedure, your affiant

requested that Defendant produce records of police calls to all businesses in the Town of Hallie, during the period of time in which Plaintiff's business has operated. These businesses included the following:

a. Heckels Big Steer, a 24-hour restaurant.

b. A Kwik Trip convenience store.

c. A Holiday gas station.

d. Plaintiff's store, Pure Pleasure.

3. Defendant supplied your affiant with such information, a copy of which is attached hereto as Exhibit A and incorporated by reference as if fully set forth herein.

4. Your affiant further requested, in addition to the minutes of the Town board meeting, which are attached to the affidavit of Town Board Chairman Gary Misfeldt, in support of Defendant's motion for summary judgment, the contemporaneous tape recordings made of said meetings.

5. Your affiant has particularly reviewed the tape recording of the meeting of April 6, 1998, when Malcolm Prinzing and Willard Olson, two officers of Plaintiff Di Ma Corp., appeared before the Hallie Town Board and requested modification of the hours of operation requirement, and requested Town Board Members to justify the hours of operation provision.

6. Because the microphone connected to the tape

recording was before Board Chairman Misfeldt, and was limited in its ability to pick up audibly the comments made by the audience, a complete transcription of what was said was impossible to produce.

7. However, your affiant was able to transcribe in full the comments of Board Chairman Misfeldt, as well as Town Board Member Sippel.

8. An accurate transcription of those comments is attached hereto as Exhibit B.

9. Your affiant read with some incredulity Town Board Chairman Misfeldt's assertion that, among the reasons that the Town enacted the ordinance were the following:

> "(c) Loitering by minors or the presence of minors at or in proximity to 24-hour a day adult-oriented establishment...
>
> e. The impact 24-hour a day adult-oriented establishments would have upon the quality of life in the Town of Hallie (i.e., potential harm to children in the area due to proximity with the Town park and recreation area.)"

10. As a result of reading these patently absurd assertions, your affiant obtained a copy of Hallie Ordinance No.

A.80

119, setting a curfew for minors in the Town of Hallie. A copy of said ordinance is attached hereto as Exhibit C.

11. Your affiant executes this Affidavit in opposition to Defendant's motion for summary judgment.

_____

Randall D.B. Tigue

Subscribed and sworn to
before me this___day of
September, 1998

_____

Notary Public

Exhibit A A.81

98-0665 INVESTIGATE PERSONS 3/7/98
0319 HECKELS BIG STEER
COMP RPTS ARGUMENT IN PROGRESS AT ABOVE LOC.ONE: SUBJ ID AS MANTIE R CARTIE,9/17/75,126 W CEDAR ST,CF.OTHER
SUBJ NOT IDENTIFIED.MANTIE WAS TOLD TO LEAVE.MANTIE WAS VERY INTOXICATED.
98-0746 THEFT 3/14/98
0216 HECKELS BIG STEER
TWO SUBJS WALKED OUT OF HECKEL'S W/O PAYING.ID AS CORY SETTERKIND,M/W,11/12/76,215 1/2 RURAL ST,CF,720-7129
$5.01 & TOSEPH P REYNOSO,M/W,7/15/78,16389 61ST AV,CF,WI,726-9805,$5.22.REYNOSO CHARGED W/DC.SEE RPT.BILL PD
98-0780 INVESTIGATE PERSONS 3/15/98
0400 HECKELS -BIG STEER
PAF WAS SENT TO HECKELS BIG STEER REFERENCE A FIGHT. UPON ARRIVAL EVERYTHING 10-2.ONE PARTY HAD LEFT & THE OTHER WAS EATING

98-0851 INVESTIGATE PERSONS 3/22/98
0330 HECKELS BIG STEER
COMP RQSTS ASSISTANCE W/HAVING SOME UNRULY PATRONS REMOVED FROM THE RESTAURANT.THREE SUBJS REMOVED W/O INCINCIDENT.LORETTA L EYERLY,9/22/64,MELISSA K HERRING,8/27/
65,STEVEN C GILBERT,8/19/70.

HALLIE POLICE DEPARTMENT

CASE NUMBER TYPE RDATE RECD LNAKE
NARI
NAR2
NAR3
NAR4

A.82

98-0905 THEFT 3/28/98
0410 HECKELS BIG STEER
DINING ROOM MNGR ROSEMARY A REID RPTS AT APPROX 2:11AM
3/28/98,THREE MALE SUBJS LEFT HECKELS W/O PAYING FOR THEIR BILL TOTALING $11.76.TWO OUT OF THE THREE SUBJS WERE ID BY THEIR WAITRESS,ANGELA DAHL.SUBJ 01-BRANDON

98-0939 THEFT 4/1/98
0243 RECKELS BIG STEER
comp RPTS THREE MALES WALKING OUT W/O PAYING FOR $28.08 IN MEALS.SUBJS LEFT IN A 85 CHEV CAMARO,SILVER W/A RED STRIP.PL ISXJ-935 LISTED TO JESSE D LAWSON,309
W GARDEN ST,06,CF,WI.CFPD WENT TO RESIDENCE,LOCATED

98-1089 INVESTIGATE PERSONS 04/12/98
0305 HECKELS BIG STEER
COMP RQSTS OFCR WALK THROUGH BLDG FULL OF LOUD PEOPLE.No ARRESTS,WARNINGS ISSUED.

98-1090 MISC 4/12/98
0336 HECKELS BIG STEER
COMP RQSTD OFCR SPEAK W/JESSE S BLODGETT, 3/25/77,
19851 CTH X,LOT #23,CF,WI,720-1737,REF TWO WEEKS AGO
SUBJ WALKED OUT W/O PAYING.HE PAID TONIGHT,$30.13.THE
BILL IS TAKEN CARE OF W/HECKELS

98-1115 INVESTIGATE PERSONS 04/15/98
0304 HECKELS BIG STEER
COMP RPTS VERBAL ARGUMENT BETWEEN MALE & FEMALE COUPLE WHO NOW HAVE LEFT THE

RESTAURANT A ARE GETTING INTO A BLUE CHEV IN THE PARKING LOT. LOC VEH & COUPLE IN THE PARKING LOT.BOTH 10-56,,JUST FOOLING AROUND.NO PROBLEMS

'98-1400 THEFT5/7/98
0202 HECKELS BIG STEER

ALICE KUNSMAN,WAITRESS AT HECKELS RPTS 3 BRN HAIR FEMALES,2 IN 20'S,1 IN 30'S LEFT W/O PAYING FOR THEIR FOODf$29.32.NO VEH DESC AVAIL.THE 30? YOA FEMALE SAID.SHE WORKED AT HECKELS FOR 2 1/2 YRS/MIDNIGHTS.LACK CON

04/261960355 MICHAELS RESTAURANT
)6 1316 THEFT
JOHN p 11/15/720,224 N GRAND AV,CF,WI,IS A WAITER STATE THAT THREE YOUNGMEN HAD LEFT THE RESTAURANT w/o PAYING BILL OF $9.81.

7-0139 OPEN DOOR 1/11/97
0420 KWIK TRIP

EMPLOYEE ARRIVED FOR WORK AT KWIX TRIP & FOUND DOOR UNLOCKED 3844 WORTHLESS CHECKS

10/16/97 0700 KWIK TRIP

RCPD, LT JIM FOSTER RPTD VIA WRITTEN RPT THAT ON 9/24/97 A SUBJ ID AS SHARI L HOLMEN,F/W,4/26/77,13518 14TH ST,OSSBO,WI, 715-597-2073,HAD CAME TO ECPD ADMTED

TO HIM THAT A. TRACEY L BROWN,M/W,917/70,HAD ISS

A.84

HALLIE POLICE DEPARTMENT CASE NUMBER TYPE DATE RECD INANE

NAR1
NAR2
NAR3
NAR4

96-0164

THEFT

01/16/96 0632 HOLIDAY GAS STATION

MARY JAROS MNGR,HOLIDAY,RPTS UNKN MALE DRIVING FORD RANGER TWO TONE GRAY/RED RANGER W/BLK TOPPER DROVE OFF W/16.677 GALLONS UNLEADED GAS W/O *PAYING,$20.00.VEN* HEADED STH 124.DLM CHKD AREA & NOTIFED CPFD.UTL.

96-0274

THEFT

01/23/96 0548 HOLIDAY GAS STATION

COMP RPTS GAS *SKIP-$9.00.UPON D*LK ARVL,COMP STATED THEY MADE A MISTAKE,NO GAS sxip.vEH WAS 86 PLY HOR,4DR SILVER,PL OPEB827.OWNER:LOUIS W KING,1/10/48-LOUIS is RZVOKED.NFR.

96-0703 THEFT 03/05/96

0520 HOLIDAY GAS STATION

MARY TAROS,MNGR HOLIDAY STATION RPTS ON 2/25/96,AT2:57PM,A SUBJ ID AS RUSSELL A FUNK HAD PUMPED $5.02 OF UNLEADED GAS INTO HIS VEH.MR. FUNK WAS UNABLE TO PAY THE $5.02 FOR THE GAS SO

AT THIS TIME,MR. FUNK LEFT HIS
96-1328 MISC TRAFFIC 04/27/96 0247 HOLIDAY GAS STATION
COMP RTPS 4 MALES,1 FEMALE,IN IT BLUE DODGE OMNI,PLATE IPPS-693,W/OPEN INTOXICANTS IN VEH.ALL APPEARED INTOX LEFT HOLIDAY ON CTH OO,SB TO 53.UNITS 10-60,TIME OF CALL,UNABLE TO LOCATE.ECPD/CFPD NOTIFIED.VEH LISTED TO
96-1443 INVESTIGATE PERSONS 05/08/96

0757 HOLIDAY GAS STATION
CHSO RCVD RPT OF 14-15 YOA MALE HANGING AROUND HOLIDAY FOR PAST 4-5 HRS.JUST LEFT,CROSSED RWY.KWT RSPND.LOC
SUBJ HEAR SHOP PHARMACY. SUBJ: JESSE A JUDKINS,1116180
914 MENOMONEZE ST,EC,WI,835-3009,PARENTS:JOHN' &
96-2232 MISC TRAFFIC 07/08/96 0230 HOLIDAY GAS STATION
COMP WANTS To KNOW WHATS HAPPENING W/A VEH PARKED IN LOT FOR WEEK.VEH LT BLUE 85 CHEV MONTE CARLO W/PLATE OPYR-352,OWNER DANIEL G OLSEN OF 215 NORTH ST,DANE,WI,53529,PH 0608-849-6461.0811 HRS,7/9/96, ATTEKPTED PHONE
96-2628
misc 08/11/96 0331 HOLIDAY GAS STATION
CHRIS D LANTZ,3/29/71,2930 STARR AV,EC,WI,ATTENDANT AT HOLIDAY RRPTS RED VAN DROVE OFF W/O PAYING FOR $17.50 IN GAS.VER STOPPED BY DMP/TRK,DRIVER STEVEN ARTHUR JENSEN,4/26/50,PO BX 416,GRAND MARAIS,MN,LOCATED SB ON 96-2968.

THEFT 09/12/96 0250 HOLIDAY GAS STATION
WENDY L BODWIN,2/12/71,ATTENDANT AT HOLIDAY

Complainant: A86
DOB:
Address: .....
Apt. ..... Phone _____city
State: ..... Zip Code. Danger (YIN):

Incident Description:
S3
Squad/Badge #9: 4S3 AddT'l Reports . So
Protected : No

Rcv'd By: 451 Day: FRI Date Committeds Tiate Committed:

Mess. Key Ident. (CAG)	Control Number (OCA)	Cont. Agency NCIC
ECI	98006341	W10090500
Date Reported (RPD)	Time Reported (TRP)	Location Grid Number (LGN)
0511SI99	23 : 45	028

Place Committed (PIC);
CTR J 0 PURE PLEASURE

KRD	Squad/Badge # (SMF)	Time ABsig. (T316S)	Time Arr. (TAR)	Time Clr. (TCL)
R433	23 : 45	23 : 46		00 : 06
1 8 N		U 0 C		U C S
02	9015	C		

Officere/Vehicles Dispatched : I

21/W 0e: 44 OiSO 4 FFLUE PD
NO. 051 M
Thur 05-21-96 Chippewa County Shariff's Department
Time:

A87

9:37 ar, Initial Complaint Record

Case Number :
90004125 Date Reported 041011-98
Reported By: PURE Pleasure DO
Address: 3965 CTH J Apt. Phone #: 715/720-7756
City: CHIPPEWA FALLS
State: WI Zip Code: 54729
Danger *(YIN): N*
Complainant: HAUSER GLEN M *JR* DOD: 10/21/59
Address: 636 SAXONWOOD
Apt. 0: Phone #: 71S/831-0506
City: ALTOONA Code. 54739
Danger (YIN): N
Incident Descr *33 396-5 STORE 10-56

Squad/Badge #9: 232 Addt'l Reports : No
Protected so

Rcv'd *By: 4SS* Day: WED Date Committed:Time Committed:
Mess. Key Control Number (OCA) Cont. Agency NCIC Ident. (CAG)
ECI 98004125 W10090soo
Date Reported (RPD) Time Reported (TRP) Location Grid Number (LGN)
04/01/90 21 . 47 02a

Place, Committed (PLC)
396S CTH T

squad/BADGE NO. 33

Time Assig. Time Arr. (TAR) Time Clr. (TCL)
232 21 - 47 22 : 02 22 : 02

A.88

1 S N	U 0 C	U C 9
01	9821	R

05/21/t8 Be-44 CHSO 4 HALLIE PD
NO.051 gal

Thur OS-21-98 Chippewa County Sheriff's Department
Time: 9:51 a7

Initial Complaint Record

Case Number : 98001266
Date. Report 01/28/98
Reported By: PURE PLEASURES
DOB:
Address: 3965 CTH J Apt. Phone #: 715/720-7756
City: CHIPPEWA FALLS State: WI
Zip Code: 54729 Danger (Y/N): N
Complainant:
DOB:
Address: Apt.
Phone #:
City: State- Zip Code:
Danger (Y/N):
Incident Description:#13 (PURE PLEASURES) RQST OFFICER REF TO SUB IN CUSTODY REP THEFT. 10-95 MICHAEL J CHRISTNER M/W 05/05/73 TO CHSO JA-It~,,

Squad/Badge #a: 234 Addt'l Reports : No
Protected : No

Rev'd By- 457 Day- WWDate Committed:
Time Committed:

Ness. Key	Control Number (OCA)	Cont. Agency NCIC Ident. (CAG)
ECI	98001266	W10090500

A89

Date Reported (RPD) Time Reported (TRP) Location Grid Number (LGN)
01/28/98 02 : S9 028

Place Committed (PLC):
PURE PLEASURES
HRD Squad/Badge # (SBN)Time Aosig.(TJLS)
Time Arr.(TAR) Time Clr. (TCL)
P23402 : 59 03 : 01 05 : 44

Thur OS-21-98 Chippewa County Sheriff's Department
Time: 9:37 ar
Initial Complaint Record

Case Number : 98003969
Date Reporped, 03/29/98
Reported By: PURE PLEASURES
DOB-
Address: 3965 CTH J Apt. Phone #.
71S/720-7756
City: CHIPPEWA FALLS State: WI Zip Code:
54729 Danger (YIN): N
Complainant:
DOB:
Address:Apt.
Phone #:
City: State: Zip Code:
Danger (YIN):
Incident Description:
#34 (SH 124 AT US 53 US) REPORT OF TRANSFORMER BLEW UP POLE ON FIRE.
NFR

squad/Badge #9. FPgoo Addt'l Reports No
Protected No
Rcv'd By: 452 Day: SUN Date Committed. Time

Committed: A90

mass. Key Ident. (CAG)	Control Number (OCA)	Cont. Agency NCIC
ECI	98003969	W10090500

Date Reported (RPD)	Time Reported (TRP)	Location Grid Number *(LGN)*
03/29/98	08 : 45	028

EXHIBIT B A98

April 6, 1998 Hallie Board Meeting

Misfeldt:

"Mal why would we consider, and I think the Board feels that we've been reasonable, why would we consider allowing a business of your type which a good share of the general public would describe this as being there to satisfy individuals vices and needs, why would we considered or allow you any more privileges than we would allow a drinking establishment? Explain the difference."

Misfeldt:

I read an article in this morning's paper regarding, they did a study on crime. I assume it was nation-wide, and they indicated that 40% of all the major crime was, uh, alcohol involved. I guess my position is that they would be more opportunity for those 40% to be involved in some sort of a crime from between 2 in the morning 'til 8 in the morning than prior to that. I read that article and I guess (tape goes blank) and leave at 2a.m. and spend time in your establishment, which again I thing a lot of people feel is a form of vice just like alcohol is, you know. It just doesn't make sense to me for a business of your type to be open during that time. My position is that there is probably more opportunity for well let's face it, your video booths or arcades or whatever you call them. I think there is more opportunity during those hours for inappropriate sexual activity, heterosexual activity, homosexual activity, during these periods, than there is earlier in the evening. I just feel that being closed from 2a.m. to 8a.m. is just not unreasonable. I mean you still have the opportunity for individuals that work all of the shifts to frequent your (interruption) so as a result

of your business being open during that period of time, if we get one call a month, a complaint in your area, with a half a dozen individuals that have had to much to drink, an are kind of overdoing it a little bit in your business, I would say that's one too many responses. I mean we want those folks hopefully home, not out and about after they're inebriated or had too much to drink.

Misfeldt:

If your were the Town Board, put yourself in our position, what would you say to the individuals that, and there's been several individuals I've got a stack of letters that have been sent to the town, basically asking us to close, do everything within our means to close your business? I mean we realize that we're not in a position to do that and we do not have any intentions to do that. But there is much of the general public that doesn't, No 1, approve of the business and certainly doesn't approve of that business being open 24 hours per day. So what would you tell our town constituents, our area constituents in the various municipalities, how would you explain that to them?

Sippel:

I think we discussed this ordinance, as Bill will tell you, at how many meetings before we actualy decided to pass this? We talked to the attorney and we talked to you a number of times and tried to work something out that we felt would be somewhat complimentary to you as well as to the people in the community. We have over 5,000 people in the Town of Hallie and we heard **from** tons of them on this and from lots of them who were not, and who would just go by and were not in the town and I think we owe ... when we did this we thought we owed that to the constituents of the town because that's the only place where we could really control anything

by the statutes and so, we chose to do that. I think that we discussed it very thoroughly and I think that we passed was fair.

ORDINANCE NO. 119

curfew

TOWN OF HALLIE, CHIPPEWA COUNTY, WISCONSIN

THE TOWN BOARD OF THE TOWN OF *HALLIE DO ORDAIN AS FOLLOWS.*

That the curfew ordinance of August 19, 1963, is repealed and recreated to read:

1. No minor, under the age of fourteen (14) years shall be or remain in or upon any of the streets, public areas or commercial establishments in the Town of Hallie between 10:00 p.m. and 5:00 a.m. unless accompanied by a parent, guardian or adult person having custody of said minor, or unless such minor is required by his employment to be in or about the places herein mentioned within the hours above stated, as shown by written evidence by his employer, then in the minor's possession, or such minor is then proceeding to or from his home or place of employment.

2. No minor under the age of sixteen (16) years shall be or remain, in or upon any of the streets, public areas or commercial establishments between 11 :00 p.m. and 5:00 a.m. unless accompanied by a parent, guardian or adult person having custody of said minor, or unless such minor is required by his employment to be in or about the places herein mentioned within the hours above stated, as shown by written evidence by his employer, then in, the minors possession, or such minor is then proceeding to or from his home or place of employment.

5. Penalty. Any minor who violates this ordinance shall be questioned *by the* police officers with the minor's name, age, address and name or his or her parents, Guardian or custodian ascertained and recorded in the police department records. The minor shall be instructed to return to his/her place or living immediately. The parents, guardian or legal custodian shall be notified by regular first class mail by the police department of such violation. Such notice shall. state the time, place and date where the minor was found. Any parent, guardian or legal custodian of a child violating this ordinance who has been jailed notice of a previous violation within a twelve (12) month period shall, upon conviction thereof, forfeit to the Town of Hallie the sum of not less than $25.00 nor more than $100.00 for the first offense and not less than $50.00 nor more than $200.00 for the second and subsequent offenses within a twelve (12) month period.

That this ordinance shall take effect upon passage and publi-

cation.

Dated this 5th day of June, 1978.

First Reading:

Second Reading:
Adopted:
Published :
Attest:

A.95

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

DiMa, Corporation, a
Minnesota corporation,

Plaintiff,

AFFIDAVIT OF KEITH FEHR

vs.

Court File No.
98-C-240-C

The Town of Hallie,

Defendant.

STATE OF MINNESOTA)
)SS
COUNTY OF HENNEPIN)

Keith Fehr, being first duly sworn on oath, hereby deposes and says the following:

1. I work as a clerk at the Pure Pleasure bookstore in the Town of Hallie, State of Wisconsin.

2. On June 2, 1998, at approximately 11:35 p.m., I was working at the store when a Hallie Police Department

Officer, Jim Lemay stopped in the store and asked if I could identify someone.

3. He then produced a photograph of someone apparently suspected of committing a sexual assault at the Kwik Trip store. I looked at the photograph, and advised him that I could not identify the person in the photograph.

4. He then asked if we had maybe seen him come through the store in the last few hours, and I said I did not believe so, but that I would keep an eye out for him.

5. I then offered to photocopy the picture and hang it on the wall.

6. While I was photocopying the picture, Officer Lemay and I began to talk and the conversation led to the problems the Town of Hallie was causing the store, by adopting the hours of operations ordinance.

7. I told Officer Lemay that I thought it was just a political move to keep politicians in office, and how asinine it was to close a store during the time of day that it gets cleaned and then say it was for health and safety reasons.

8. Officer Lemay responded that he agreed, and further stated that the police were happy the store was open all night, as it was a crime deterrent, in that vandals and thieves could not break in.

9. I then hung the picture of the suspect on the

counter. A99

10. Before leaving, Officer Lemay stated that he would probably stop in occasionally to see how things were going or if we were having any problems.

11. At no point in our conversation did Officer Lemay indicate that he thought police would be better able to deal with crime, if the store were closed; in fact, he suggested exactly to the contrary.

_____
Keith Fehr

Subscribed and sworn to
before me this_____day of
September, 1998

_____
Notary Public

A.98

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

DiMa, Corporation, a
Minnesota corporation,

Plaintiff,

AFFIDAVIT OF MARK VAN GELDER

vs.

Court File No.
98-C-240-C

The Town of Hallie,

Defendant.

STATE OF MINNESOTA)
)SS
COUNTY OF HENNEPIN)

Mark Van Gelder, being first duly sworn on oath, hereby deposes and says the following:

1. Your affiant is the operations manager of DiMa Corporation, Plaintiff in the above-entitled matter.

2. As such, your affiant supervises all of the stores which DiMa operates, both in Minnesota and Wisconsin.

3. Your affiant was requested to investigate the

allegation contained in Paragraph 20e of the Affidavit of Gary Misfeldt, which attempts to justify the hours of operation ordinance, inter alia, based upon:

> "The impact 24-hour-a-day adult-oriented establishments would have upon the quality of life in the Town of Hallie (i.e. potential harm to children in the area due to proximity with the Town park and recreation area)."

4. Your affiant has personally examined the alleged "proximity" of "Pure Pleasure" to the Town park and recreation area and has discovered the following:

a. The park is located on 117th Street, approximately two miles away from the Pure Pleasure store, as the crow flies. Moreover, the crow would have to fly directly over a 4-lane highway, in order to reach the park.

b. Your affiant has also attempted to reach the park by driving directly. In order to do so, one would have to drive approximately .2 miles along J Street to the 4-lane highway, and then travel an additional .1 miles, making a left turn, traveling am additional one mile, before reaching 117th Street, at which time one would make a right and travel an addition .8 miles in order to reach the park.

5. In fact, looking from the store, one cannot see the park, and looking from the park, one cannot see the Pure Pleasure store.

6. The park in fact consists mostly of four baseball diamonds, and one small play area for children.

7. The ballparks are lighted, while baseball games are being played thereon. Otherwise, there is no lighting in the park whatsoever. The park is totally dark between the hours of 2:00 a.m and 3:00 a.m., and 8:00 a.m., the hours at issue in this case.

8. Any suggestion by Mr. Misfeldt that this ordinance is necessary in order to "protect" children at the park is ludicrous at best.

_____
Mark Van Gelder

Subscribed and sworn to
before me this____day of
September, 1998

_____
Notary Public

Supreme Court, U.S.
FILED
MAR - 8 2000
CLERK

(2)

No. 99-1328

In The

Supreme Court of the United States

DiMa CORP.,

Petitioner,

v.

THE TOWN OF HALLIE, WISCONSIN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENT TOWN OF HALLIE IN OPPOSITION TO PETITION

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OR CALL COLLECT (402) 342-2831

STATEMENT OF THE CASE BY THE TOWN OF HALLIE

DiMa Corporation (DiMa), the petitioner, owns and operates the "Pure Pleasure" adult bookstore in Hallie, Wisconsin. Pure Pleasure sells sexually explicit, non-obscene, books and magazines. In March, 1998, Hallie enacted a municipal ordinance which regulates adult-oriented establishments, including "adult bookstores" like Pure Pleasure. App. 2.

Hallie's ordinance regulates adult-oriented establishments in various ways but the petitioner challenges only one of its provisions; the hours of operation limitation found at Section 1.06. Under that section, an adult-oriented establishment may not be open between 2:00 a.m. and 8:00 a.m. on Monday through Friday, between 3:00 a.m. and 8:00 a.m. on Saturday, and between 3:00 a.m. and noon on Sunday. App. 2. These are the same limits for hours of operation placed on establishments that serve alcohol in Wisconsin. App. 2. Petitioner claims that § 1.06 infringes on its right to free speech under the First Amendment by preventing Pure Pleasure's storefront from being open for business on a 24 hour a day basis.

SUMMARY OF ARGUMENT BY THE TOWN OF HALLIE

The Town of Hallie has general municipal power to regulate activities protected by the First Amendment when the legislative objective lies within its legitimate sphere of regulatory power, when the regulation furthers an important governmental interest, when the government interest is unrelated to suppressing the content of the regulated material and when the restriction on alleged First Amendment rights is essential to furtherance of that interest. Hallie has the specific authority to impose reasonable time, place and manner restrictions on protected speech, provided the restrictions can be

legally justified. Hallie ordinance § 1.06, the hours of operation provision, is justified because the town board relied on evidence from other communities which shows the adverse secondary effects that are associated with purveying sexually explicit material.

ARGUMENT BY THE TOWN OF HALLIE FOR DENYING PETITION

When the federal district court initially reviewed Hallie's motion for summary judgment, it correctly concluded that Hallie ordinance § 1.06, the hours of operation provision, is a content-neutral time, place, and manner restriction on protected speech. (i.e., sexually explicit expression). That holding relied upon the Supreme Court's decision in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), with interpretative guidance from Justice Souter's concurring opinion in *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S.Ct. 2456, 115 L.Ed.2d 504 (1991). The district court specifically found that the Fifth, Sixth and Eleventh Circuits also follow Justice Souter's concurrence in *Barnes*. *See, J & B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362 (5th Cir. 1998); *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129 (6th Cir. 1994); *International Eateries of America, Inc. v. Broward County*, 941 F.2d 1157 (11th Cir. 1991). The Third and Eighth Circuits do the same. *See, Phillips v. Borough of Keyport*, 107 F.3d 164, 175 (3rd Cir. 1997); and, *Farkas v. Miller*, 151 F.3d 900, 904 (8th Cir. 1998).

Affirming dismissal of DiMa's § 1983 action, the Seventh Circuit ruled that Hallie ordinance § 1.06 is content-neutral under the same Supreme Court precedent cited to by the district court. *Renton* and *Barnes* say that governmental regulation of adverse secondary effects associated with the public sale of sexually explicit materials is constitutionally acceptable because those restrictions are *deemed* to be content-neutral.

Petitioner does not argue that the Seventh Circuit erred in finding that § 1.06 is a time, place and manner restriction on speech. Rather, petitioner complains that the Seventh Circuit reached its conclusion without performing a proper factual analysis of the ordinance's enactment. First, says petitioner, the Seventh Circuit impermissibly declined to consider the legislative motives of Hallie town board members who promulgated the ordinance. Second, says petitioner, the Seventh Circuit wrongly determined that Hallie's legislators could rely upon the experience of the City of West Allis, Wisconsin, in enacting the hours of operation provision. Third, says petitioner, the Seventh Circuit should have considered evidence produced by DiMa which claimed no "adverse secondary effects" resulted from operating Pure Pleasure's storefront 24 hours a day.

With respect to the first issue, the Seventh Circuit agreed with DiMa that some town board members may have had motives that differed from the legislative intent espoused by the language of the ordinance. However, it also found that the actual motives of those who voted for the ordinance were irrelevant to a constitutional analysis of § 1.06. "[I]n analyzing whether Hallie's ordinance violates the First Amendment, we do not ask whether the motives of the Board can be justified as content-neutral time, place and manner restrictions, but rather whether the ordinance itself can be so justified. See *Renton*, 475 U.S. at 48." App. 9.

Regarding the second issue, petitioner maintains that the Seventh Circuit improperly deferred to the legislative judgment of Hallie board members rather than requiring "evidentiary justification" for the ordinance's hours of operation section. The Seventh Circuit, relying on the Supreme Court's decision in *Renton* found that in responding to a First Amendment challenge, the municipality bears the burden of showing that there is some evidence which supports its proffered justification. In

reality, this is not a particularly onerous burden for municipalities to meet. Here, the Seventh Circuit held that, "The First Amendment does not require a city before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as *whatever* evidence the city relies upon is *reasonably believed* to be relevant to the problem that the city addresses." (Citing to *Renton*). App. 10. (Italics added).

Under that standard and relying upon Justice Souter's concurring opinion in *Barnes*, the Seventh Circuit determined that Hallie had done enough to show it reasonably relied upon the experience of other Wisconsin cities when promulgating the town's adult-oriented establishments ordinance. The Seventh Circuit cautioned other municipalities not to read its decision too broadly since for other cases a greater record might be required to justify similar regulatory measures.

On the third and last issue, the Seventh Circuit implicitly decided that regulation of adverse secondary effects is not *a priori* dependent upon a municipality suffering from such conditions. Combating the known secondary adverse effects associated with the sale of sexually explicit materials is a significant and well-established governmental interest. Petitioner maintains that the reasons cited by Hallie for an hours of operation restriction are a sham because none of the community's fears are borne out by actual negative experiences stemming from operation of the Pure Pleasure store. However, in *Renton*, the Supreme Court authoritatively held that communities are entitled to rely on the experiences of *other* cities in determining whether regulation is appropriate for them.

The legitimacy of Hallie's regulation of the Pure Pleasure has been conceded by the petitioner. DiMa admits that adverse secondary effects are not only associated with its business but are also severe enough to warrant

some governmental regulation. Petitioner's only complaint about Hallie's ordinance is that it cannot have its storefront open 24 hours a day.

Ordinances restricting the hours of operation in adult-oriented establishments have often been upheld by federal courts. *See, Tee & Bee, Inc. v. City of West Allis*, 936 F.Supp. 1479, 1492 (E.D. Wis. 1996). [Citing to *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074 (5th Cir. 1986) and *Broadway Books, Inc. v. Roberts*, 642 F.Supp. 486 (E.D. Tenn. 1986).] In *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435 (6th Cir. 1998), the Sixth Circuit found it was reasonable for Tennessee state lawmakers to believe, based upon the experience of other communities, that restricting the hours of operation for businesses selling sexually explicit material tends to *deter* adverse secondary effects caused by those enterprises. *See, Richland Bookmart* at 440-441. It is no different for Hallie's lawmakers.

The Seventh Circuit correctly recognized that deterrence and prevention are logical goals for the type of regulations at issue in this case. Therefore, any evidence from DiMa that "it hasn't happened here yet" is irrelevant to the issue of preventative governmental regulation for the Town of Hallie.

CONCLUSION

Petitioner fails to state a compelling reason for reviewing the Seventh Circuit's decision in this case. Accordingly, the petition for writ of certiorari should be denied.

Dated this 8th day of March, 2000.

Joel L. Aberg
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State Bar No. 01004725
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APR 14 PAGE 2

Supreme Court, U.S.
FILED
APR 3 2000
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(3)

No. 99-1328

IN THE
SUPREME COURT OF THE UNITED STATES

DiMa Corp.,

Petitioner,

vs.

The Town of Hallie
Wisconsin,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF

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Counsel for Petitioner

13pp

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INTRODUCTION

This brief is submitted pursuant to the provisions of Rule 15.8 of the Rules of the Supreme Court of the United States, this being a brief calling attention to new cases or other intervening matter not available at the time of the party's last filing. In particular, this brief is submitted as a result of the decision of this Court in *City of Erie v. Pap's A.M.*, 529 U.S. ___(March 29, 2000).

ARGUMENT

I. THE *PAP'S* DECISION PRODUCED NO OPINION OF THIS COURT.

The most obvious feature of this Court's decision in *City of Erie v. Pap's A.M.*, supra, is not only did the opinion not produce a single majority opinion; it did not even produce a plurality or concurring opinion which could be considered an opinion of the Court set forth by this Court in *Marks v. United States*, 430 U.S. 188 (1977), in which this Court suggested that where no single opinion obtains a majority vote, but where there is an opinion concurring in the judgment on sufficiently narrow grounds that it would necessarily be endorsed by at least five justices, that opinion will constitute the opinion of the Court.

No such opinion appears as a result of the *Pap's* case. Indeed, there appears to be only two points upon which a

majority of justices in the instant case agreed:

(1) That the City of Erie's petition for writ of certiorari should not be dismissed as moot, notwithstanding the closure of Respondent's business.[1]

(2) That the ordinance in question, prohibiting total nudity in dance performances, could not be justified on the basis of preventing adverse secondary effects.[2]

1Part II of the O'Connor opinion, joined in by Chief Justice Rehnquist, and associate justices Kennedy, Breyer, and Souter, plainly commanded a majority of the Court.

2The five Justices joining in this opinion are as follows, Justice Stevens, with whom Justice Ginsburg joins, dissenting, stating, "To believe that the mandatory addition of pasties and a G-string will have any (emphasis by Justice Stevens) kind of noticeable impact on secondary effects requires nothing short of a titanic surrender to the implausible"(Id. at___slip opinion at P. 7, Stevens J. dissenting); dissenting opinion of Justice Souter: "It is not apparent to me as a matter of common sense that establishments featuring dancers with pasties and G-strings will differ markedly in their effects on neighborhoods from those whose dancers are nude" (Id. at___slip opinion at p. 4, n. 3, Souter J. concurring and dissenting); and the concurring opinion of Justice Scalia, joined in by Justice Thomas: "I am highly skeptical, to tell the truth, that the addition of pasties and G-strings will at all reduce the tendency of establishments such as Kandyland to attract crime and prostitution, and hence to foster sexually transmitted disease (Id. at ___slip opinion at p. 10, Scalia J. concurring)."

Apart from these two positions, no five justices in *Pap's* relied upon any proposition which could remotely be considered an opinion of the court under the *Marks* test. Certainly, the opinion of the Court cannot be considered the O'Connor plurality opinion, holding that the prohibition of nudity could be justified as a method of preventing adverse secondary effects, since, as already noted, supra, a five-justice majority specifically rejected the proposition that the regulation would have any effect whatsoever on reducing adverse secondary effects. Certainly, the opinion of the Court cannot be the Scalia concurrence, since the holding of that opinion, to-wit: that the lawsuit had been rendered moot was also specifically rejected by a majority of the justices. The Scalia opinion, to the extent that it upholds the ordinance based upon the proposition that nude dancing itself is inherently immoral, also plainly fails the *Marks* test for at least two reasons: First of all, since, as the Scalia opinion persuasively argues, the case should have been dismissed as moot, such mootness would deprive the Court of jurisdiction to consider merits of the claim, thus rendering any opinion on the merits mere obiter dicta. Compare *Richardson v. Ramirez*, 418 U.S. 24 (1974). Secondly, even if the comments of the Scalia concurrence were not pure dicta, the notion that government may ban expressive conduct it considers

immoral is certainly a holding much broader in scope than is government's ability to ban expressive conduct which causes adverse secondary effects, thus precluding the Scalia opinion from being the holding of the Court under the *Marks* test. Finally, the dissenting opinions, having been rejected by at least six justices, cannot be considered the holding of the Court.

II. A MAJORITY OF THIS COURT IN *PAP'S* CLEARLY REJECTED THE SEVENTH CIRCUIT'S "OBJECTIVE TRUTH IS IRRELEVANT" STANDARD.

Notwithstanding the absolute failure of five justices of this Court in *Pap's* to agree on much of anything, it is clear that a majority of this Court plainly rejected the Seventh Circuit's analysis that "objective truth" as to whether Petitioner's uses cause adverse secondary effects which would justify an hours of operation restriction was irrelevant. The O'Connor concurring opinion in *Pap's* made it clear that the plurality of this Court accepted the city's "secondary effects" justification of the anti-nudity ordinance only because it was not contested by the Respondent in that case. Justice O'Connor wrote, in part IV of her opinion:

> "Here, Kandyland has had ample opportunity to contest the Council's findings about secondary effects - before the Council itself, throughout the state proceedings, and before this Court. Yet to this day, Kandyland has never challenged

> the City Council's findings or cast any specific doubt on the validity of those findings. Instead, it has simply asserted that the Council's evidentiary proof was lacking. In the absence of any reason to doubt it, the city's expert judgment should be credited (emphasis supplied)." Id.at 17.[3]

Justice O'Connor proceeds to reject Justice Souter's concurring opinion, which would have demanded a much stronger evidentiary basis for the Council's conclusion with respect to adverse secondary effects, stating the following:

> "Justice next hypothesizes that the reason we cannot accept Erie's conclusion is that, since the question whether these secondary effects occur is 'amenable to empirical treatment,' we should ignore Erie's actual experience and instead require such an empirical analysis. [Citation omitted.] In *Nixon* [v. *Shrink Missouri Government PAC*, 528 U.S. ___ (January 24, 2000)], however, we flatly rejected that idea. [Citation omitted.] (Noting that the 'invocation of academic studies said to indicate' that the threatened harms are not real is insufficient to cast doubt on the experience of the local government)." Id. at 19.

3The so-called "expert judgment" consisted of the City Council members' "first-hand knowledge of what took place at and around nude dancing establishments in Erie," enabling such members to make "particularized expert judgments about the resulting harmful secondary effects." Id. at 16.

The reference to the *Nixon* case was to in this Court's decision upholding the validity of the Missouri legislature's limitation on the amount of contributions to candidates for state office. At issue was whether a sufficient evidentiary basis existed to support the purported need for such a restriction, based upon the justifications of prevention of corruption and government and public perception of corruption in government. The Court then proceeded to outline the evidentiary record made in the trial court to support the conclusion that both interests would be furthered by the legislation in question. This Court, by Justice Souter then concluded as follows:

> "There might, of course, be need for a more extensive evidentiary documentation if Petitioner's had made any showing on their own to case doubt on the apparent implication of *Buckley' s* and the record here (emphasis supplied)., but the closest Respondents come to challenging these conclusions is their invocation of academic studies said to indicate that large contributions to public officials or candidates do not actual result in changes in the candidates' position. Brief for Respondent's Shrink Missouri Government PAC, et al 41; Smith, Money Talks; Speech, Corruption, Equality and Campaign Finance, 86 Geo. L.J. 45, 58 (1997); Smith, Faulty Assumptions and Undemocratic Consequences of Campaign Finance Reform, 105 Yale L. J. 1049, 1067-1068 (1995). Other studies, however, point the other way. Reply

> Brief for Respondent Bray 4-5; F. Sorauf, Inside Campaign Finance 169 (1992); Hall & Wayman, Buying Time: Moneyed Interests and the Mobilization of Bias in Congressional Committees, 84 a.m. Pol. Sci. Rev. 797 (1990); D. Magleby & C. Nelson, The Money Chase 78 (1990). Given the conflict among these publications, and the absence of any reason to think that public perception has been influenced by the studies cited by Respondents, there is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters." Id. at ___, slip opinion at p. 7.

Thus, it is clear from both the O'Connor concurrence in *Pap's* and the majority opinion of this Court in *Nixon*, written by Justice Souter, that this Court has adopted the following standards with respect to evidentiary burdens to justify restrictions on First Amendments rights:

1. Automatic deference to governmental conclusions occurs only when those conclusions are not challenged by the proponents of First Amendment rights.

2. Where such a challenge occurs, and the evidence is contradictory, or does not necessarily dispute the government's conclusion deference will occur in those cases as well.

3. Where there is a conflict between the city's own experience and academic studies, the city's own experience prevails.

4. Apart from the foregoing situations, objective truth plainly does make a difference.

Judged by these standards, the inadequacy of Respondent's showing in the instant case is obvious.

To begin with, the undisputed record in the instant case is not that the city's own experience has been that adult entertainment causes adverse secondary effects; quite to the contrary, the unrefuted record indicates that the town's experience has been absolutely to the contrary. As noted in the original petition, an objective study of the police calls to both the Pure Pleasure adult bookstore to a 24-hour restaurant, and 24-hour convenience stores indicates that police calls to the adult bookstore have been substantially fewer than to the 24-hour restaurant, and no greater than the calls to the convenience store (appendix at A.92-A.102.).

Moreover, in an uncontradicted affidavit, a clerk of the Pure Pleasure store indicates that he was advised by a Hallie Police Officer that the Hallie police were grateful that the store was open 24 hours per day, in that its being open was a

different to crime (Appendix at A.108).[4]

Finally, it should be noted that Petitioner offered expert testimony indicating that the only study ever done by a governmental agency attempting to correlate law enforcement problems and late night operations of adult entertainment establishments concluded that adult entertainment no more law enforcement problems than do other establishments open during late night hours.[5]

Plainly, given the fact the town's conclusions of adverse' secondary effects were directly challenged, not only by academic studies, but by the town's "own experience," and that the evidence in that regard was essentially uncontradicted, this case plainly falls outside the deference to governmental judgment, recognized in *Pap's* and *Nixon*.

CONCLUSION

4The District Court dismissed this admission as hearsay, (Appendix at A.29). However, it is plainly not hearsay, in that it was a statement offered against the Town of Hallie by the town's "agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship..." See Rule 801(d)(2)(D) of the Federal Rules of Evidence.

5The study is referenced by the Seventh Circuit in its opinion in the Appendix at A.12.

For all of the foregoing reasons, the petition for writ of certiorari should be granted and the matter set on for oral argument. In the alternative, certiorari should be granted, the judgment of the Seventh Circuit vacated, and the matter remanded for reconsideration in light of this Court's recent decisions in *Pap's* and *Nixon.*

Respectfully submitted,

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